



## **HUMOUR IN THE SOUTH AFRICAN LAW OF DEFAMATION**

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## **ABSTRACT**

The South African law of defamation seeks to balance the plaintiff's right to reputation against the defendant's right to freedom of expression. Humour complicates this balance because its appreciation is hyper context-dependent and subjective, rendering the line between serious defamatory statements of fact and non-serious jokes difficult to draw. This dissertation discusses the ways in which the South African law of defamation regulates humorous statements, paying particular attention to the element of defamatoriness and the defences to an action for defamation. It argues that superiority humour, which is funny because it belittles the plaintiff, is being unduly curtailed by the courts' erroneous application of a flawed test for defamatoriness based on the plaintiff's mere exposure to ridicule. The undesirable result is that the defendant will be held liable for superiority humour even in those instances where the plaintiff has not been defamed. It also argues that humour should receive greater protection under the defences available to the defendant in an action for defamation, particularly the defence of qualified privilege.

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## I THE PROBLEM

‘At what point does a joke become a legal wrong, justifying resort to defamation law?’<sup>1</sup> This question couples two diametrically opposed facets of everyday life: humour and the law. On the one hand, humour is a fascinating area of study rich with philosophy, psychology and laughter. On the other hand, the law can be bland, dry and rigid. Whereas humour defies logic and clear boundaries, the law thrives on both. Thus, how might one go about ‘fitting the round peg of humor into the square hole of defamation’?<sup>2</sup>

People spend considerable time making fun of one another by engaging in the rapid-fire exchange of quips and slurs known as ‘banter’.<sup>3</sup> It is common cause that any jabs delivered during such an exchange ought to be taken with a pinch of salt on the understanding that the speaker’s intention was light-hearted rather than mean-spirited. The consequences of banter are ‘generally a few bruises that heal themselves, a stronger bond (and sense of equality) among participants in the exchange, a feeling of membership in a shared culture, and the mental stimulation of lively repartee.’<sup>4</sup>

Occasionally, however, banter goes awry. A friend may cross the invisible line between good-natured fun and mean-spirited ridicule, resulting in their statement being received as abhorrent and vindictive notwithstanding their innocent motive. Indeed, our sense of humour is so diverse and our standards of appropriacy are so volatile that what one might find funny in a particular situation is considered tragic in another. ‘For example, we might be willing to laugh at slapstick depicting an unknown older woman who falls, but are aghast at such a depiction if we know the woman.’<sup>5</sup> Similarly, ‘active loathing may be engendered by a statement or cartoon that evokes howls of laughter from another. What is amusing or funny in the eyes of one person may be cruel and tasteless to someone else.’<sup>6</sup>

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<sup>1</sup> LE Little ‘Just a joke: Defamatory humor and incongruity’s promise’ (2011) 21 *Southern California Interdisciplinary Law Journal* 95 at 95.

<sup>2</sup> Ibid at 119. The English spelling of humour is preferred to the American spelling of humor, but the latter is left unchanged in quotations.

<sup>3</sup> Definition of ‘banter’ in Merriam-Webster’s English Dictionary, available at <https://www.merriam-webster.com/dictionary/banter>, accessed on 13 February 2023. As a noun, banter is defined as ‘good-natured and usually witty and animated joking’. As a verb, to banter is ‘to speak to or address in a witty and teasing manner’.

<sup>4</sup> Little op cit note 1 at 147.

<sup>5</sup> Ibid at 131.

<sup>6</sup> *Salomone v MacMillan Publishing Co* 411 NYS 2d 105 (1978) at 109.

Given humour's ubiquity and our fickle responses to it, humour and the law make for strange bedfellows. Yet humour has appeared in many branches of South African law including contract,<sup>7</sup> criminal,<sup>8</sup> employment<sup>9</sup> and intellectual property law.<sup>10</sup> As such, how the law of defamation deals with humour is an area ripe for scholarly analysis. Banter amongst friends is commonplace, but could your friend sue you for turning them into a meme? Comedians detest political correctness, but could professional jokesters face legal repercussions for their unfiltered remarks? Satirists make a living through derision, but could politicians use the law of defamation to intimidate and silence their detractors?

Such questions deserve greater attention in response to the exponential increase in internet access that has accompanied the twenty-first century and led to the creation of an 'information superhighway'.<sup>11</sup> Social media use has skyrocketed, and the ability to communicate instantly with more than one person at a time has resulted in more people being exposed to humour, often in the form of mockery and ridicule, than ever before.<sup>12</sup> This proliferation of online modes of communication has undoubtedly led to an increased incidence of allegedly defamatory humour, given that people tend to be more brazen online than they otherwise are in person.<sup>13</sup>

That is not to say that people avoid telling risqué jokes in person. For example, whilst hosting the South African Music Awards in 2017, M-Net Idols judge Somizi Mhlongo told a joke about the popular singer Zahara in which he jabbed at her alleged drinking problems.<sup>14</sup> Somizi quipped that Zahara, who was not present at the awards-show, was probably enjoying a drink at the event's free bar. Although some in the audience laughed at Somizi's joke, others audibly groaned and Zahara threatened to sue him for defamation.<sup>15</sup>

The threat of litigation poses considerable danger to joke-telling, for the nature of litigation allows the plaintiff with the deepest pockets to have their day in court. Far from taking jokes

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<sup>7</sup> *Moosa v Mohamed* 1939 TPD 271.

<sup>8</sup> *S v Cassidy* 1978 (1) SA 687 (A).

<sup>9</sup> *CEPPWAWU obo Evans / Poly Oak 1324* [2003] 12 BALR 1324 (MEIBC); *Solidarity obo Best / Highveld Steel & Vanadium Corporation Ltd* [2008] 9 BALR 819 (MEIBC).

<sup>10</sup> *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC).

<sup>11</sup> J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) at 121. The Latin spellings of *iniuria*, *injuriarum* and *injuriandi* are preferred to the English spellings of *injuria*, *injuriarum* and *injuriandi*, save again for quotations.

<sup>12</sup> *Reddell v Mineral Sands Resources (Pty) Ltd* 2023 (2) SA 404 (CC) para 195.

<sup>13</sup> PP Singh 'Social media and the *actio injuriarum* in South Africa – an exploration of the new challenges in the online era' (2014) 35 *Obiter* 616.

<sup>14</sup> IOL 'Zahara "sues" Somizi over "alcoholic" joke at #SAMA23' *IOL* 30 May 2017, available at <https://www.iol.co.za/entertainment/celebrity-news/local/zahara-sues-somizi-over-alcoholic-joke-at-sama23-9426878>, accessed on 13 February 2023.

<sup>15</sup> *Ibid.*

in their stride, such ‘unmeritorious claimants’<sup>16</sup> often use the threat of legal proceedings to stifle humorous expression.<sup>17</sup> If successful, defamation suits can have serious financial consequences. Sizeable damages awards are often dwarfed by even larger legal fees, both of which could bankrupt the individual defendant and sometimes even a media house.<sup>18</sup> Why would anyone risk telling a potentially defamatory joke if the cost of litigation is so high?<sup>19</sup>

That the defendant might end up bankrupt is, of course, an insufficient reason not to hold them liable *if* they have in fact committed a legal wrong, for ‘then it is perfectly acceptable for their utterance to be chilled.’<sup>20</sup> However, drawing the line between jokes that will attract liability for defamation and thus restrict humour, and those that will escape liability for defamation and thus protect humour, is a notoriously difficult task. Nonetheless, it is a line that the law of defamation must draw because the interests at stake in an action for defamation are high.

The South African law of defamation seeks to balance two competing constitutionally protected rights: the defendant’s right to freedom of expression and the plaintiff’s right to their reputation.<sup>21</sup> This can be termed the orthodox justification for defamation law.<sup>22</sup> The right to freedom of expression is expressly mentioned in the Constitution,<sup>23</sup> and its reverence is typically attributed to its role in enhancing the values of democracy and truth.<sup>24</sup> However, the right to freedom of expression is not absolute. It is internally restricted by the Constitution itself,<sup>25</sup> and additional limitations may be imposed in terms of law of general application.<sup>26</sup> The common law of defamation is a recognised limitation.<sup>27</sup> Although the right to reputation is nowhere mentioned in the Constitution, it is — at least for natural persons — grounded in and

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<sup>16</sup> D Milo *Defamation and Freedom of Speech* (2008) at 2.

<sup>17</sup> Little op cit note 1 at 117.

<sup>18</sup> M du Preez *Oranje, Blanje, Blues: ‘n Nostalgieuse Trip – Vrye Weekblad 88–94* (2006) at 54–65. In the wake of *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A), the damages award of R90 000 and legal costs of R2 million effectively bankrupted one of the defendant newspapers, *Vrye Weekblad*.

<sup>19</sup> *Reddell* supra note 12 para 122.

<sup>20</sup> E Descheemaeker ‘Three keys to defamation: *Media 24* in a comparative perspective’ (2013) 130 *SALJ* 435 at 446–7.

<sup>21</sup> *Khumalo v Holomisa* 2002 (5) SA 401 (CC) paras 26–8.

<sup>22</sup> Whether the legal interest in reputation serves as the most coherent basis for the law of defamation remains contested within academic circles. See P Birks ‘Harassment and hubris: The right to an equality of respect’ (1997) 32 *Irish Jurist* 1; A Fagan ‘Defamation, reputation and respect’ in PJ Schwikkard & SV Hoctor (eds) *A Reasonable Man: Essays in Honour of Jonathan Burchell* (2019); F Jurgens *Risk as Injury: An alternative interpretation of the South African law of defamation* (unpublished PhD thesis, University of Cape Town, 2019); K Moshikaro ‘Unjust contempt as the “gist” of defamation law’ (2022) 12 *Constitutional Court Review* 59.

<sup>23</sup> Constitution of the Republic of South Africa, 1996 s 16(1).

<sup>24</sup> Burchell op cit note 11 at 9–16.

<sup>25</sup> Constitution supra note 23 s 16(2).

<sup>26</sup> *Ibid* s 36(1).

<sup>27</sup> *Khumalo* supra note 21 para 41.

derived from the constitutionally protected right to dignity.<sup>28</sup> Unlike character, which is demonstrative of how a person actually is, reputation is demonstrative of how a person appears to be.<sup>29</sup> Reputation thus speaks to the good name and respect that the plaintiff enjoys in society, or conversely the bad name and disdain that they endure.<sup>30</sup>

In a defamation case involving an allegedly humorous publication, the court must strike an appropriate balance between the defendant's right to express themselves through humour and the plaintiff's right not to have their reputation tarnished by way of a defamatory, albeit humorous, statement. The defendant should not be allowed to 'murder another's reputation in jest'.<sup>31</sup> However, in drawing the line between humour that attracts liability for defamation and humour that avoids it, courts will inevitably upset one of two camps. Where the law is too heavy-handed and overly restrictive of humorous expression, those who prize the social value of comedic exchange will feel aggrieved. Where the law is too permissive of legal injury inflicted in the pursuit of humour, those who prize their reputations and the values of respect and decency will feel short-changed.

Thus, the precise issue for determination is whether the fact that the defendant's statement was humorous should affect whether liability for defamation will be imposed on them. This necessarily implicates two sub-questions, namely whether the audience's appreciation of the defendant's publication as humorous should negate its defamatoriness and whether the defendant's intention to be humorous should insulate them from liability. This dissertation aims to provide a clearer framework for answering these questions.

## II THE ROADMAP

Chapter 2 provides a high-level overview of the South African law of defamation. It summarises the five elements of the delict in sufficient detail to serve as a solid theoretical foundation upon which the remainder of the dissertation is built. A clear summary of the law of defamation's overarching principles and rules is necessary to contextualise the difficulties posed by humour under certain elements of the action.

Chapter 3 traces the past and present treatment of humour in the law of defamation. It concludes that jest, which may refer either to the audience's reception of the defendant's

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<sup>28</sup> Constitution supra note 23 s 10. However, the Constitutional Court recently reiterated in *Reddell* supra note 12 paras 57–68 that a trading corporation derives its reputational interest from the common law, and not the constitutional, right to dignity.

<sup>29</sup> J Burchell *The Law of Defamation in South Africa* (1985) at 19.

<sup>30</sup> *Payne v Republican Press (Pty) Ltd* 1980 (2) PH J44 (D) at 110–11.

<sup>31</sup> *Donoghue v Hayes* (1831) Hayes Ir Exch Rep 265 at 266.

publication as humorous or to the defendant's humorous intention, falls to be considered both as a contextual factor capable of influencing the enquiry into the defamatoriness of the defendant's statement and as a defence capable of rebutting either the presumption of the defendant's intention to injure (*animus iniuriandi*) or the presumption of wrongfulness.

Chapter 4 evaluates the fate of humour under the defamatoriness enquiry. It introduces three predominant theories of humour which explain why humorous communications are funny, namely the superiority, release and incongruity theories. These three theories are then used to analyse the Constitutional Court's divergent interpretations of the humour behind the impugned publication in the seminal defamation case involving humour: *Le Roux v Dey*.<sup>32</sup> It criticises the majority's finding of defamatoriness in that case on the ground that it erroneously employed a flawed test for defamatoriness based on the plaintiff's exposure to ridicule, which unduly curtails superiority humour. The lasting result is that the defendant will be held liable for superiority humour even in those instances where the plaintiff has not been defamed.

Chapter 5 evaluates the viability of jest as a defence to an action for defamation. It argues that jest is ineffectual as a defence aimed at rebutting the presumption of the defendant's intention due principally to the evidential difficulty implicit in rebutting the presumption and the unavoidable overlap between the risky enterprise of joke-telling and the wide-reaching nature of the standard of intention that is *dolus eventualis*. This leads to a consideration of whether there is scope for the protection of defamatory humour under the existing defences aimed at rebutting the presumption of the defendant's wrongfulness instead. It argues that there is room for the increased protection of defamatory humour under the defence of qualified privilege in particular, which may be developed to recognise certain comedic occasions as being privileged.

Chapter 6 concludes the dissertation with a summary of its core findings.

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<sup>32</sup> 2011 (3) SA 274 (CC).

## CHAPTER 2 THE LAW OF DEFAMATION

### I INTRODUCTION

The South African civil law of defamation primarily serves both to protect and to vindicate the plaintiff's right to reputation.<sup>1</sup> The traditional remedies of a prohibitory interdict and compensatory damages are typically awarded to the plaintiff who successfully establishes, on a balance of probabilities, that the defendant wrongfully and intentionally published a defamatory statement referring to the plaintiff.<sup>2</sup> The onus falls on the plaintiff to establish a prima facie case against the defendant, but in an action for defamation the plaintiff need only establish three out of the five elements, namely the (a) publication (b) of a defamatory statement (c) referring to the plaintiff. Thereafter it is presumed that the defendant's conduct was both (d) wrongful and (e) intentional.<sup>3</sup> These two presumptions cast the net of liability for defamation very wide, so the defendant may escape liability by raising recognised or new defences aimed at rebutting either.<sup>4</sup> Section II below summarises each element of the delict.

### II THE ELEMENTS OF DEFAMATION

This section is written on the assumption that the plaintiff instituting the action for defamation has *locus standi*. In South Africa, only organs of state are explicitly barred from suing for defamation.<sup>5</sup>

#### (a) *Publication*

Publication can take place through any medium be it audible speech, visible print, a photograph, a cartoon or even a hand gesture.<sup>6</sup> Where words are spoken, publication is presumed if they are spoken within earshot of others.<sup>7</sup> Where words are written, publication is presumed if the medium is distributed to members of the public.<sup>8</sup> However, simply making the statement is insufficient to establish publication. The meaning and significance thereof must

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<sup>1</sup> *Le Roux v Dey* 2011 (3) SA 274 (CC) para 31.

<sup>2</sup> *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 18.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Le Roux* supra note 1 para 123.

<sup>5</sup> *Die Spoorbond v SA Railways, Van Heerden v SA Railways* 1946 AD 999.

<sup>6</sup> *Le Roux* supra note 1 paras 86 and 104.

<sup>7</sup> *Raliphaswa v Mugivhi* 2008 (4) SA 154 (SCA) para 16.

<sup>8</sup> *Trimble v Central News Agency Ltd* 1934 AD 43 at 49.

also be appreciated, received or understood by the third parties to whom it is published.<sup>9</sup> Therefore, publication only occurs if the defendant communicates their statement to at least one other person aside from the plaintiff and that person receives the meaning thereof.<sup>10</sup> So, where the defendant verbalises a defamatory statement in a language that the audience does not understand, publication has not occurred.<sup>11</sup>

(b) *Defamatory statement*

Determining defamatoriness involves a two-stage enquiry. First, the meaning of the defendant's statement must be established. Secondly, it must be determined whether that meaning conveys a defamatory imputation of the plaintiff.<sup>12</sup>

Where words are alleged to be defamatory per se because their primary meaning is so obvious to the reasonable observer, then the plaintiff need not aver anything further.<sup>13</sup> Secondary meaning and quasi-innuendo are alternative allegations that may be tendered by the plaintiff, but these have technical requirements that shall be ignored here.<sup>14</sup> The statement's primary or ordinary meaning must be objectively determined.<sup>15</sup> Any subjective meaning that the defendant intended to convey is irrelevant.<sup>16</sup> So too is the subjective meaning attributed to the statement by the people to whom it was actually published.<sup>17</sup> A court can only concern itself with the meaning that the reasonable listener, reader or viewer of ordinary intelligence would have attributed to the statement.<sup>18</sup> The context surrounding the statement undoubtedly influences its meaning,<sup>19</sup> so meaning must be examined in light of the circumstances surrounding the publication as a whole.<sup>20</sup>

Notwithstanding the importance of context when determining meaning, courts must strive for accuracy and not manipulate words to make them appear either incendiary on the one hand

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<sup>9</sup> *Sutter v Brown* 1926 AD 155 at 164.

<sup>10</sup> The meaning of the word 'publisher' in the law of defamation is wider than the dictionary definition because it also includes distributors — so-called 'secondary publishers' — of already-published defamatory material.

<sup>11</sup> *Vermaak v Van der Merwe* 1981 (3) SA 78 (N).

<sup>12</sup> *Sindani v Van der Merwe* 2002 (2) SA 32 (SCA) para 10.

<sup>13</sup> D Visser 'Compensation for harm to the personality — the actio iniuriarum' in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) at 1173.

<sup>14</sup> JC Van der Walt & JR Midgley *Principles of Delict* 4 ed (2016) para 106; FDJ Brand 'Defamation' in *LAWSA* 3 ed Volume 14 (2017) para 117.

<sup>15</sup> *Crawford v Albu* 1917 AD 102 at 118.

<sup>16</sup> *Sutter* supra note 9 at 163.

<sup>17</sup> *Mangope v Asmal* 1997 (4) SA 277 (T) at 284–6. However, when secondary meaning is alleged, evidence concerning how actual observers understood the statement may be relevant and admissible.

<sup>18</sup> *Demmers v Wyllie* 1980 (1) SA 835 (A) at 842A–C.

<sup>19</sup> *Johnson v Rand Daily Mails* 1928 AD 190 at 204–5.

<sup>20</sup> *Sindani* supra note 12 para 11.

or innocent on the other.<sup>21</sup> Therefore, a dictionary definition is not always appropriate and has limited probative value.<sup>22</sup> For example, ‘the word “cow” may mean a female bovine animal in one context, but in another, when spoken with reference to a woman, it may mean rude, disagreeable person.’<sup>23</sup> The primary meaning attributed to that word by the reasonable observer will differ depending on the context in which it is uttered.<sup>24</sup>

At the second stage of the defamatoriness enquiry, it must be objectively determined whether the established meaning of the defendant’s statement conveys a defamatory imputation of the plaintiff. The question to be asked at this stage, per Lord Atkin in the English case of *Sim v Stretch*,<sup>25</sup> is whether the statement would ‘tend to lower the plaintiff in the estimation of right-thinking members of society generally’.<sup>26</sup> The threshold is not whether the statement *actually* injured the plaintiff’s reputation. The court can only concern itself with whether the statement would *probably* do so.<sup>27</sup> Therefore, the defendant’s statement could still have a defamatory impact even if those to whom it was published do not believe what it asserted.<sup>28</sup>

Concerning *right-thinking* members of society, these are average people of ordinary intelligence whose views are reconcilable with constitutional values.<sup>29</sup> As such, it cannot be defamatory to be labelled as being gay, black or a woman, for even if South African society is proven to be overwhelmingly homophobic, racist or sexist, that ‘does not mean that [these are the views of] *right-thinking* members of society, for what counts are the views of those members of society who respect the rights of others and uphold constitutional values.’<sup>30</sup>

Concerning right-thinking members of society *generally*, the test for defamatoriness may be adapted to consider the views of a particular segment of society whose reasonable members might consider an otherwise innocuous statement to be defamatory.<sup>31</sup> Context is relevant at this stage of the enquiry as well, so both where and to whom the statement is published matters.<sup>32</sup> For example, ‘a speech made after dinner, understood by all present as a harmless joke, may

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<sup>21</sup> J Burchell *The Law of Defamation in South Africa* (1985) at 90–1.

<sup>22</sup> *Sindani* supra note 12 para 11.

<sup>23</sup> M Loubser & R Midgley *The Law of Delict in South Africa* 3 ed (2017) at 422.

<sup>24</sup> Reasonable observer is used to denote the ordinary listener, reader or viewer depending on the medium of publication.

<sup>25</sup> [1936] 2 All ER 1237 (HL).

<sup>26</sup> *Ibid* at 1240; *Mohamed v Jassiem* 1996 (1) SA 673 (A) at 703.

<sup>27</sup> J Neethling, JM Potgieter & A Roos *Neethling on Personality Rights* (2019) at 205 footnote 62. Even though actual damage is not required, there is notable contestation concerning whether a mere tendency or propensity for, or likelihood or probability of, damage is required.

<sup>28</sup> *Nasionale Pers Bpkt v Long* 1930 AD 87 at 97.

<sup>29</sup> Loubser & Midgley op cit note 23 at 425.

<sup>30</sup> Visser op cit note 13 at 1172. Emphasis in original.

<sup>31</sup> *Mohamed* supra note 26.

<sup>32</sup> *Le Roux* supra note 1 paras 40–3, 97–101 and 106–7.

amount to [defamation] when it is published in a newspaper and reaches those who do not understand the circumstances.’<sup>33</sup> However, this context-specific qualification must be treated with caution and in most instances the ordinary standard will be appropriate.<sup>34</sup>

The *Sim v Stretch* test has been applied by South African courts in the main when determining the defamatory impact of the defendant’s statement.<sup>35</sup> However, it is not the only test for defamatoriness that has been recognised throughout common law jurisdictions. Other examples include whether the statement: was calculated to injure the plaintiff’s reputation by exposing them to ‘hatred, contempt or ridicule’;<sup>36</sup> was likely to injure the plaintiff in their office, profession or trade;<sup>37</sup> tended to put the plaintiff in the position of being ‘shunned and avoided’;<sup>38</sup> or displayed the plaintiff in a ridiculous light.<sup>39</sup> Nevertheless, the *Sim v Stretch* test is arguably the most congruent with the orthodox understanding of the law of defamation as being concerned with the plaintiff’s legal interest in their reputation.<sup>40</sup>

(c) *Reference to the plaintiff*

The defamatory statement must refer to the plaintiff.<sup>41</sup> Direct reference to the plaintiff — for example, where they are expressly mentioned by name — easily satisfies both requirements. Implied reference to the plaintiff must be proven on the facts.<sup>42</sup> The test is whether the reasonable person would have understood the statement to be referring to the plaintiff.<sup>43</sup> This test is also context-specific, so the court must consider whether the reasonable reader of a newspaper, listener to a radio station or viewer of a television programme would, by virtue of their position as being either a once-off or a frequent audience member, have understood the publication to be referring to the plaintiff.<sup>44</sup>

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<sup>33</sup> WL Prosser *Handbook of The Law of Torts* 3 ed (1964) at 759–60.

<sup>34</sup> Visser op cit note 13 at 1173.

<sup>35</sup> *Le Roux* supra note 1 para 91.

<sup>36</sup> *Parmiter v Coupland* (1840) 6 M & W 105 at 108.

<sup>37</sup> *Drummond-Jackson v Medical Association* [1970] 1 WLR 688 at 698.

<sup>38</sup> *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 at 587.

<sup>39</sup> *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 at 453.

<sup>40</sup> See Chapter 4IV below for criticism of the exposure to ridicule test.

<sup>41</sup> *A Neumann CC v Beauty Without Cruelty International* 1986 (4) SA 675 (C) at 679–81.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Mthembu-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) para 39.

<sup>44</sup> Visser op cit note 13 at 1175.

(d) *Wrongfulness*

Whether the defendant's statement is deemed wrongful largely depends on the reasonableness of imposing civil liability, which in turn is informed by considerations of public policy and the legal convictions (*boni mores*) of society.<sup>45</sup> Once the plaintiff has established a prima facie case of defamation, wrongfulness is presumed.<sup>46</sup> The onus then falls on the defendant to raise a defence that might justify their conduct and absolve them of delictual liability.<sup>47</sup> There is no closed list of defences aimed at rebutting the presumption of wrongfulness.<sup>48</sup> New grounds of justification may be developed in accordance with the Constitution<sup>49</sup> and the *boni mores* of society, meaning that the defendant can rebut the plaintiff's claim 'in a wide and elastic variety of ways'.<sup>50</sup> Certain instances, where it has been deemed reasonable for the defendant's right to freedom of expression to trump the plaintiff's right to reputation, have crystallised into recognised defences. Each has its own set of unique requirements that must be proven on a balance of probabilities. They are truth for the public benefit,<sup>51</sup> fair comment,<sup>52</sup> privileged occasion<sup>53</sup> and reasonable publication.<sup>54</sup>

(e) *Intention*

Fault can take one of two forms: negligence (*culpa*) or intention (*dolus*). For the purposes of the *actio iniuriarum*, of which defamation is an example, negligence is insufficient. Fault must take the form of intention.<sup>55</sup> More specifically, a particular kind of intention is required, namely *animus iniuriandi* — which is the intention (*animus*) to injure (*iniuriandi*).<sup>56</sup> For defamation,

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<sup>45</sup> *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 402–3.

<sup>46</sup> *Khumalo* supra note 2 para 18.

<sup>47</sup> *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1202H.

<sup>48</sup> *Ibid* at 1204D.

<sup>49</sup> Constitution of the Republic of South Africa, 1996.

<sup>50</sup> TW Price 'Animus injuriandi in defamation' (1949) 66 *SALJ* 4 at 25.

<sup>51</sup> *Modiri v Minister of Safety and Security* 2011 (6) SA 370 (SCA).

<sup>52</sup> *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC).

<sup>53</sup> For examples of absolute privilege, see ss 58(1), 71(1) and 117(1) of the Constitution supra note 49. For examples of qualified privilege, see Brand op cit note 14 paras 126–9.

<sup>54</sup> *Bogoshi* supra note 47.

<sup>55</sup> Although, this is arguably complicated by the defence of reasonable publication. Some have questioned whether the onus on publishers to prove that their publication was *reasonable* is not identical to them proving that they acted *without negligence*. See J Burchell 'Media freedom of expression scores as strict liability receives the red card: *National Media Ltd v Bogoshi*' (1999) 116 *SALJ* 1.

<sup>56</sup> Whether *animus injuriandi* is an essential element of defamation was a contentious debate throughout the twentieth century. See RG McKerron 'Fact and fiction in the law of defamation' (1931) 48 *SALJ* 154; M de Villiers '*Animus injuriandi*: An essential element in defamation' (1931) 48 *SALJ* 308; Price op cit note 50;

this can be further delineated as the intention to defame.<sup>57</sup> The requirements for *animus iniuriandi* are twofold. First, the defendant's will must be directed at the plaintiff's injury. Secondly, the defendant must be conscious of the wrongfulness of their conduct.<sup>58</sup>

The forms of intention in the law of delict mirror those in criminal law. They are (i) *dolus directus*, where the defendant's aim and object were to defame the plaintiff; (ii) *dolus indirectus*, where although not the defendant's primary aim and object, the defendant foresaw the possibility of defaming the plaintiff as substantially certain; and (iii) *dolus eventualis*, where although not the defendant's primary aim and object, the defendant subjectively foresaw the possibility of defaming the plaintiff, reconciled themselves with this possibility and published the defamatory material anyway.<sup>59</sup>

As with wrongfulness, the defendant's *animus iniuriandi* is presumed once the plaintiff has established a prima facie case of defamation.<sup>60</sup> The reason for this presumption stems from the evidential difficulty implicit in proving the defendant's intention.<sup>61</sup> The law presumes that the defendant intended to defame the plaintiff if the defendant's statement is interpreted by the reasonable observer as doing exactly that.<sup>62</sup> To rebut the presumption, the absence of *animus iniuriandi* 'must be gathered from the circumstances of each particular case'.<sup>63</sup> The defendant must present evidence that they did not intend to defame sufficient to excuse their conduct. Common defences aimed at rebutting the presumption of intention are those of mistake, provocation and jest — although the exact location of jest remains unclear and contested.<sup>64</sup>

### III CONCLUSION

The purpose of this chapter was to lay the theoretical building blocks of the law of defamation upon which the remainder of the dissertation is built. Section II provided a high-level summary of the five elements of the delict, namely the (a) publication (b) of a defamatory statement (c) referring to the plaintiff, which is presumed to be both (d) wrongful and (e) intentional.

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Burchell op cit note 21 at 149–74; PQR Boberg 'Defamation South African style — the odyssey of *animus iniuriandi*' in C Visser (ed) *Essays in honour of Ellison Kahn* (1989).

<sup>57</sup> M Nathan *The Law of Defamation (Libel and Slander) in South Africa* (1933) at 82.

<sup>58</sup> Although, Harms DP for the majority of the Supreme Court of Appeal in *Le Roux v Dey* 2010 (4) SA 210 (SCA) para 39 said that 'the animus iniuriandi requirement generally does not require consciousness of wrongfulness.' In the Constitutional Court supra note 1 para 137, Brand AJ did not find it necessary to engage with nor confirm Harms DP's finding in this regard. The question has thus been left open.

<sup>59</sup> Burchell op cit note 21 at 166.

<sup>60</sup> Nathan op cit note 57 at 83: It is 'inferred from the act itself, without proof of any state of mind.'

<sup>61</sup> *Dippenaar v Hauman* (1878) 8 Buch 135 at 143.

<sup>62</sup> *Sutter* supra note 9 at 163.

<sup>63</sup> *Mackay v Philip* (1828–1849) 1 Menz 455 at 463.

<sup>64</sup> Burchell op cit note 21 at 1. See Chapter 5 below.

Whereas the onus is on the plaintiff to establish the first three elements, the defendant bears the onus of rebutting either presumption by raising recognised or new defences that either justify the wrongfulness of their conduct or excuse their intention to injure. Jest, which is typically listed as a defence aimed at rebutting the presumption of *animus iniuriandi*, commands the focus of the next chapter.

## CHAPTER 3 JEST: PAST AND PRESENT

### I INTRODUCTION

A jest is defined as ‘a joking or mocking remark’.<sup>1</sup> To jest is ‘to say things intended to be humorous’.<sup>2</sup> These definitions undoubtedly locate jest within the broad realm of humour. However, Chapter 2 above established that jest also bears a legal meaning in the South African law of defamation. It exists, at least according to most textbooks on the matter,<sup>3</sup> as a defence aimed at rebutting the presumption of the defendant’s *animus iniuriandi*, which arises upon the defendant’s publication of a defamatory statement referring to the plaintiff.<sup>4</sup> This chapter traces the chronological development of the concept.

Section II surveys the historical treatment of jest by prominent academics and judges throughout (a) the pre-1900s, (b) the twentieth century and (c) the early 2000s. Section III introduces the most important modern authority on jest as it currently stands: the Constitutional Court’s judgment in the case of *Le Roux v Dey*.<sup>5</sup> Following (a) a summary of the facts of the case, the Court’s engagement with jest under the elements of (b) defamatoriness and (c) intention is assessed. Section IV reflects on the future prospects for jest post-*Le Roux*. It (a) identifies the unreported case of *Pudney v Engler*<sup>6</sup> as proof that the reasoning of the majority of the Constitutional Court in *Le Roux* is likely to be adopted in future defamation cases involving allegedly humorous publications, and (b) introduces a selection of the academic commentary post-*Le Roux* that questions both the efficacy and the true location of jest as a defence aimed at rebutting either the presumption of intention or the presumption of wrongfulness. Section V concludes the chapter.

### II PAST

#### (a) Pre-1900s

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<sup>1</sup> Definition of ‘jest’ in Merriam-Webster’s English Dictionary, available at <https://www.merriam-webster.com/dictionary/jest>, accessed on 13 February 2023.

<sup>2</sup> Ibid.

<sup>3</sup> JC Van der Walt & JR Midgley *Principles of Delict* 4 ed (2016) para 142; FDJ Brand ‘Defamation’ in *LAWSA* 3 ed Volume 14 (2017) para 134; J Neethling, JM Potgieter & A Roos *Neethling on Personality Rights* (2019) at 243–4.

<sup>4</sup> *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 18.

<sup>5</sup> 2011 (3) SA 274 (CC).

<sup>6</sup> [2016] JOL 37379 (WCC).

In 1698, the prominent Dutch jurist and Roman-Dutch law expert, Johannes Voet, said of jest in his *Commentarius ad Pandectas*:<sup>7</sup>

It is an exception [to liability] when it is clear that such things were uttered with a view not to doing a wrong, but to joking and sporting during friendly conversations. Thus it seems that much must be left here to the discretion of the judge for him to decide from circumstances and persons whether or no[t] a wrong appears to have been inflicted in this way.<sup>8</sup>

Nay again a person is not held liable in the action on wrongs when he strikes in joke, or while he is striving in sport. It is likewise with one who has by mistake fetched a blow with the fist on a person whom he thought to be subject to his power and right of improvement; or who when he was meaning to punish him has mistakenly struck another who was standing close by.<sup>9</sup>

Both of Voet's observations appear in the English translation of his well-known commentary on Book XLVII Title X of the Pandects, otherwise known as *Justinian's Digest*, in a chapter titled 'Wrongs and Defamatory Screeds'.<sup>10</sup> They are situated under sections 8 and 20, which are headed by the translator as '*Injuriae verbis* (wrongs by words)'<sup>11</sup> and 'Absence of ill intent presumed in'<sup>12</sup> respectively.

This chapter submits that Voet's comments can be interpreted as yielding two substantive propositions for the law of defamation, namely that jest could serve both (i) as a factor capable of influencing the defamatoriness of the defendant's statement, and (ii) as a defence capable of rebutting the presumption of the defendant's intention. Although Voet did not have the neatly delineated elements of the modern action for defamation in mind at the time of his writing, his comments arguably dovetail nicely with both the objective enquiry into the element of defamatoriness and the subjective enquiry into the element of intention, respectively.

The first proposition is that jest could serve to influence the defamatoriness enquiry. This is borne out by Voet's observation that judges play a crucial role in determining whether a wrong has been inflicted through the publication of an allegedly injurious, albeit humorous, publication — ie 'whether or no[t] words used in friendly joke'<sup>13</sup> ought to be considered prima facie wrongful. According to the modern categorisation of the elements of defamation, the presumption of the defendant's wrongfulness only arises once the plaintiff has established that

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<sup>7</sup> J Voet *The Selective Voet: Being the Commentary on the Pandects* translated by P Gane (1955).

<sup>8</sup> *Ibid* at 223. Footnotes omitted.

<sup>9</sup> *Ibid* at 243–4. Footnotes omitted.

<sup>10</sup> *Ibid* at 201.

<sup>11</sup> *Ibid* at 221.

<sup>12</sup> *Ibid* at 242.

<sup>13</sup> *Ibid* at 223.

the defendant published a defamatory statement referring to the plaintiff.<sup>14</sup> So, whether the defendant's statement is presumed wrongful turns squarely on the judge's positive finding that the statement was defamatory.

Voet notes that this determination is to be made *from circumstances* — ie in light of the prevailing factual context in which the joke appeared — *and persons* — ie how the people who received the statement would have understood it.<sup>15</sup> This comment neatly dovetails with the objective test for defamatoriness, which requires the court to consider whether the reasonable observer would have understood the defendant's publication to bear a defamatory meaning that would probably have defamed the plaintiff in the eyes of right-thinking members of society generally.<sup>16</sup> In other words, the court must consider whether the reasonable observer would have understood the defendant's publication to be a joke, thereby possibly negating its prima facie defamatory impact, with due regard to the contextual circumstances surrounding the publication.<sup>17</sup>

The second proposition is that jest could serve as a defence capable of rebutting the presumption of the defendant's intention to defame. This is borne out by Voet's treatment of jest as an exception to liability — ie as a defence excusing the defendant's defamatory conduct — when it is clear that the statement was uttered with a view not to doing a wrong — ie without the requisite consciousness of wrongfulness.<sup>18</sup> To buttress his point by way of example, Voet compares a jokester to one who has struck another in the mistaken belief that they had the power or right to do so.<sup>19</sup> According to Voet, by way of analogy, the defendant who strikes at the plaintiff's reputation in jest lacks the necessary intention to defame the plaintiff. Hence Voet's translator placed this example under the heading 'Absence of ill intent presumed in'.<sup>20</sup>

Interestingly, pursuant to Voet's understanding, *absence* of intention is to be presumed in those cases where jest is raised as a defence. It is then the plaintiff who may rebut this presumption by proving that the defendant acted with defamatory intent.<sup>21</sup> This differs markedly from the modern conception of defamation, where it is the *presence*, not the absence, of the defendant's defamatory intention that is presumed once the plaintiff has made out a prima facie case of defamation.<sup>22</sup> The defendant then bears the burden of rebutting this

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<sup>14</sup> *Khumalo* supra note 4 para 18.

<sup>15</sup> Voet op cit note 7 at 223.

<sup>16</sup> *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240. See Chapter 2II(b) above.

<sup>17</sup> *Mohamed v Jassiem* 1996 (1) SA 673 (A) at 703–8.

<sup>18</sup> Voet op cit note 7 at 223.

<sup>19</sup> *Ibid* at 243–4.

<sup>20</sup> *Ibid* at 242.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Khumalo* supra note 4 para 18.

presumption by raising the defence of jest and proving that they acted without defamatory intent.<sup>23</sup> Both the positive and the negative formulation of the presumption recognise the defendant's jocular intention as being capable of excusing the defendant's conduct. Voet's conception simply favours the defendant by shifting the onus onto the plaintiff to prove the defendant's defamatory intent in those instances where humorous publication is alleged.<sup>24</sup>

From the analysis conducted above, it appears that Voet considers jest to be both (i) a factor capable of influencing the court's determination of whether the reasonable observer understood the defendant's statement to be defamatory, as well as (ii) a defence capable of excusing the defendant's defamatory intention. Mapped onto the modern categorisation of the elements of the action, this chapter submits that Voet's comments on the *Digest* yield two substantive propositions for the South African law of defamation: that jest — which may refer either to the audience's reception of the defendant's publication as a joke or to the defendant's jocular intention — has a role to play both when determining the prima facie defamatoriness of the defendant's statement and at the defences stage. The extent to which these two propositions found favour in South African law is addressed in subsection (b) below.

However, before addressing the pertinent South African defamation cases, it is worth pointing out that in 1899, the eminent academic-turned-judge Melius de Villiers alluded to a potential shortcoming with the classification of jest as a defence capable of rebutting the presumption of the defendant's intention. In the annotations to his translation of Voet's commentary on the *Digest*, De Villiers says:<sup>25</sup>

Legitimate jest excludes the idea of an intention to injure; when it appears therefore from the averment of the plaintiff in an action of injury himself that words were uttered by way of legitimate jest there would be no ground of action. But when language has been used or an act has been done which regarded by itself and in connection with surrounding circumstances does appear to constitute an injury, and from which there consequently arises a presumption that there was an intention to injure, *the allegation that the words were used, or the act was done, merely in a joke of a legitimate nature, would have to be supported by evidence to make it apparent that such was actually the case.* It is not a legitimate joke when, in order to amuse himself or to show off his wit, a person says or does things which, considering the occasion or personal circumstances of another, *he could and must have known* would be insulting, offensive, or degrading to the person or the character of the other; for, whatever his motive may have been, *he must be considered to have contemplated the consequences following from his own act.*<sup>26</sup>

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<sup>23</sup> *Le Roux* supra note 5 para 85.

<sup>24</sup> Other old authorities also recognise jest as being capable of excluding the defendant's intention to injure. See U Huber *The Jurisprudence of My Time* Volume II translated by P Gane (1939) at 405–6; A Matthaëus *On Crimes: A commentary on books XLVII and XLVIII of the Digest* Volume I translated by ML Hewett & BC Stoop (1987) at 111.

<sup>25</sup> M de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899).

<sup>26</sup> *Ibid* at 195. Emphasis added. Footnotes omitted.

It is clear from this passage that De Villiers accepts that legitimate jest could exclude the presumption of the defendant's intention to defame. However, he does not define legitimate jest. Instead, he defines illegitimate jest as language that would be insulting, offensive or degrading to the plaintiff.<sup>27</sup> According to De Villiers, in such instances where the reasonable observer takes the defendant's statement to be injurious of the plaintiff, the defendant's defence of jest must be supported by sufficiently compelling evidence which demonstrates that they did not intend to defame the plaintiff.<sup>28</sup>

Notwithstanding the evidential difficulty involved in proving the absence of intention to injure,<sup>29</sup> De Villiers reckons further that the defendant 'must be considered to have contemplated the consequences following from his own act.'<sup>30</sup> This dovetails with the standard of intention known as *dolus eventualis*, being the defendant's subjective contemplation and reconciliation with the probable defamatory consequence of their action, is sufficient to hamstring the defendant's prospect of successfully invoking the defence.<sup>31</sup>

(b) *Twentieth century*

Much of the South African law of defamation's foundational jurisprudence has been heavily influenced by De Villiers' translation and interpretation of Voet's dedicated chronicling of *Justinian's Digest*.<sup>32</sup> Therefore, what both Voet and De Villiers have to say about jest in the law of defamation must be afforded significant respect.<sup>33</sup>

Turning to more recent sources of law, the first South African case that dealt with jest in the law of defamation was *Masch v Leask*.<sup>34</sup> The facts are as follows. In 1916, having conducted sales in a crowded market square, Leask (an auctioneer) advertised to those around him that more sales were to be conducted by him at a later date. The details of those future sales had been written down on yellow papers that were then distributed throughout the square. Upon hearing Leask's pronouncement, Masch (also an auctioneer) said: '*Dit lieg jij. Daarie geel*

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> See Chapter 5II(b) below for criticism of the evidential difficulty implicit in rebutting the presumption.

<sup>30</sup> De Villiers op cit note 25 at 195.

<sup>31</sup> J Burchell *The Law of Defamation in South Africa* (1985) at 166. See Chapter 5II(c) below for the implications of this standard of intention on the viability of jest as a defence.

<sup>32</sup> H Scott 'The death of doctrine? — Private law scholarship in South Africa today' in J Basedow, H Fleischer & R Zimmerman (eds) *Legislators, Judges, and Professors* (2016) at 229.

<sup>33</sup> Although, for a critique of the dogmatic adherence to old Roman-Dutch law writers by so-called Antiquarian judges, see Proculus '*Bellum juridicum*: Two approaches to South African law' (1951) 68 *SALJ* 306.

<sup>34</sup> 1916 TPD 114.

*papier beteken niks.*<sup>35</sup> His statement loosely translates into English as: ‘You are a liar. That yellow paper means nothing.’<sup>36</sup>

Leask alleged that Masch’s statement was defamatory because it insinuated that he, Leask, was both a liar and a cheat. Masch argued that, because his words were spoken in jest, he did not possess the requisite *animus iniuriandi* for defamatory liability to result.<sup>37</sup> Writing for the Transvaal Provincial Division, Wessels J held that it was insufficient for Masch simply to allege that he had lacked the intention to defame Leask. In response to Masch’s claim that the Roman-Dutch law of defamation requires only that the intention of the party using the words be assessed, to the exclusion of how the words were understood by the ordinary bystander, Wessels J said: ‘That is a doctrine to which I cannot subscribe.’<sup>38</sup>

Instead, Wessels J held that since the statement was defamatory per se — its primary meaning was clear under the circumstances because it obviously asserted that an auctioneer was lying to prospective bidders — the only way that Masch could escape liability was by proving *both* that he had made his statement in jest *and* that it had been accepted as such by the reasonable bystander.<sup>39</sup> Wessels J reasoned that where members of the ordinary public take seriously words that by themselves are capable of injuring another, that the defendant intended them to be taken non-seriously — ie as a joke — is, on its own, insufficient to absolve the defendant of liability.<sup>40</sup> Masch could not discharge this burden on the facts of the case. Therefore, he was held liable for defamation and ordered to pay Leask £5 in damages.<sup>41</sup>

From a close reading of the case, it appears that Wessels J viewed both propositions (i) and (ii) as necessary conditions for the success of the defence of jest. In other words, Wessels J held that jest could have succeeded as a defence *if and only if* (i) Masch’s statement had been taken as a joke by the general public to whom it was published, thereby rendering it not defamatory, *and* (ii) Masch had tendered evidence of his jocular intent sufficient to rebut the presumption of his *animus iniuriandi*.<sup>42</sup> In doing so, Wessels J adopted what this chapter labels ‘the coupled approach’ to both propositions. In terms of the coupled approach, for the defendant to escape liability by invoking the defence of jest, they must prove *both* (not *either*) that their statement was understood to be non-defamatory, *and* (not *or*) that they lacked the

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<sup>35</sup> Ibid at 115.

<sup>36</sup> This translation from Afrikaans into English is my own.

<sup>37</sup> *Masch* supra note 34 at 115.

<sup>38</sup> Ibid at 116.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid. Although Leask sued Masch for £100, he only received £5 in damages.

<sup>42</sup> Ibid.

intention to injure the plaintiff's reputation.<sup>43</sup> Proof that Wessels J adopted the coupled approach to propositions (i) and (ii) is borne out by the comments on the case made by several leading authors from the twentieth century, namely Robin McKerron,<sup>44</sup> Manfred Nathan,<sup>45</sup> NJ Van der Merwe and PJJ Olivier,<sup>46</sup> and Jonathan Burchell.<sup>47</sup>

The coupled approach to jest will strike the contemporary reader as odd because where the defendant's statement is deemed to be non-defamatory, then no presumption as to their *animus iniuriandi* ever arises for them to rebut. However, the main point to take from *Masch* is that Wessels J expressly disavowed the independence of proposition (ii), namely that the defendant's jocular intention alone could excuse them of liability. Wessels J quite clearly rejected the claim, put forward by Masch's counsel, that the Roman-Dutch law of injuries recognises the defendant's absence of injurious intent as a complete defence to defamation. Instead, Wessels J held that jest could only succeed as a defence if the reasonable observer also understood the defendant's publication to be a joke, thereby neutering its defamatoriness.<sup>48</sup>

According to McKerron, 'jest in itself is never a good defence to an action for defamation.'<sup>49</sup> Rather, jest only succeeds in practice when it serves to neuter the defamatoriness of the impugned statement, and not because *animus iniuriandi* is presumed to have been absent.<sup>50</sup> As such, 'jest should not properly be included amongst the defences open to a defendant in an action for defamation.'<sup>51</sup> McKerron's strong conclusion probably stems from his being an ardent proponent of the heterodox view of defamation that does not recognise *animus iniuriandi* as being an essential element of the delict. This view, which is influenced by the English law of libel and its preoccupation with publication as the gist of the action, was held by many South African judges and academics throughout the twentieth century.<sup>52</sup>

(c) *Early 2000s*

However, the heterodox view is not the law. Rather, the orthodox view is that *animus iniuriandi* is indeed an essential element of the delict of defamation.<sup>53</sup> Johann Neethling, JM Potgieter

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<sup>43</sup> Ibid.

<sup>44</sup> RG McKerron 'Fact and fiction in the law of defamation' (1931) 48 *SALJ* 154 at 165.

<sup>45</sup> M Nathan *The Law of Defamation (Libel and Slander) in South Africa* (1933) at 117–18.

<sup>46</sup> NJ Van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 4 ed (1980) at 444.

<sup>47</sup> J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) at 300.

<sup>48</sup> *Masch* supra note 34 at 116.

<sup>49</sup> McKerron op cit note 44 at 165.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> See Neethling, Potgieter & Roos op cit note 3 at 239 footnote 378 and the cases cited there.

<sup>53</sup> *Khumalo* supra note 4 para 18; *Le Roux* supra note 5 para 85.

and PJ Visser — the authors of the second edition of *Neethling's Law of Personality*,<sup>54</sup> published in 2004 — contend that if the defendant can prove that they did not direct their will at defaming the plaintiff, then such evidence should suffice to rebut the presumption of the defendant's *animus iniuriandi*.<sup>55</sup> The authors argue that the coupled approach adopted by Wessels J in *Masch*, which disregards the defendant's plea of jest as solely evincing their absence of injurious intent, cannot be reconciled with the recognition of *animus iniuriandi* as being a material element of the action. If intention to injure alone is proven to be absent because of the defendant's jocular intent, then liability for defamation should be excluded notwithstanding that the court finds that the reasonable observer understood the statement to be defamatory.<sup>56</sup>

Danie Visser says much the same in his chapter on the *actio iniuriarum* in the ninth edition of *Wille's Principles*,<sup>57</sup> published in 2007. He notes the criticism levelled by Neethling, Potgieter and (PJ) Visser against *Masch* as disregarding the basic principles of intent. But he also reiterates De Villiers' caution that, even if it were accepted that jest could serve to rebut the presumption of the defendant's *animus iniuriandi*, 'the presence of *dolus eventualis* could prevent the defendant's escape along this avenue.'<sup>58</sup>

So it appears that academics in the early 2000s were beginning to question why, in circumstances where jest failed to negate the defamatoriness of the defendant's statement, jest could not also serve as a standalone defence capable of rebutting the presumption of the defendant's injurious intention. Section III below demonstrates that this 'uncoupled approach' to propositions (i) and (ii) was implicitly endorsed by the Constitutional Court in 2011.

### III PRESENT

This section introduces the leading modern authority on jest in the South African law of defamation: the Constitutional Court case of *Le Roux v Dey*.<sup>59</sup> Following (a) a summary of the facts of the case, the Court's treatment of jest under the elements of (b) defamatoriness and (c) intention is addressed. The discussion of the majority judgment demonstrates that the Constitutional Court implicitly endorsed the uncoupled approach to jest. Even though they did

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<sup>54</sup> J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005).

<sup>55</sup> *Ibid* at 165–6.

<sup>56</sup> *Ibid* at 166.

<sup>57</sup> D Visser 'Compensation for harm to the personality — the *actio iniuriarum*' in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007).

<sup>58</sup> *Ibid* at 1189.

<sup>59</sup> *Le Roux* supra note 5.

not find in the defendants' favour on the facts of the case, they entertained the possibility that jest could serve to rebut the presumption of intention independent of jest's role as a factor capable of influencing the defamatoriness enquiry.

(a) *Facts*

In 2006, three high school students at Hoërskool Waterkloof in Pretoria were involved, to varying degrees, in the manufacture and dissemination of an image depicting their school principal and one deputy principal naked and engaging in some form of intimate sexual activity. The bodies of the men in the picture were clearly not those of the two leaders, but one student — in Grade 9 at the time of creation — had crudely pasted the teachers' faces over those of the two (presumably, but not proven to be) gay bodybuilders depicted in the original photograph. Both bodybuilders had their own hands in the vicinity of their own respective genitals, but the school's crest had been strategically pasted over their nether regions to mask any explicit nudity. The work was not a professional photoshop and it was shoddy enough to make plain that the image was an obvious fake.<sup>60</sup>

Approximately 30 minutes after the image had been placed on the school's noticeboard the teenage boys were quickly found out and punished accordingly. Their punishment included being prohibited both from assuming leadership positions at the school and from wearing honorary colours for the remainder of the school year. In addition, they had to undergo detention at the school for three hours on five consecutive Fridays.<sup>61</sup> The school principal, Mr Becker, was satisfied with the boys' punishment and dismissed the episode for what he thought it was — a distasteful albeit common schoolboy prank directed at figures of authority within the school environment. The deputy principal, Dr Dey, was less forgiving. He laid criminal charges against the three boys, which were resolved through a diversion programme to the effect that they had to clean cages at the Pretoria Zoo as community service.<sup>62</sup> Dr Dey also pursued the matter in civil court using the *actio iniuriarum*. He claimed sentimental damages in the amount of R600 000 for the infringement caused by the image to both his dignity and his reputation.<sup>63</sup>

In the North Gauteng High Court, Dr Dey was successful on both fronts and awarded a composite amount of R45 000 in damages. Both sides appealed the judgment to the

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<sup>60</sup> Ibid paras 1, 12–14, 98–9 and 155.

<sup>61</sup> Ibid paras 15–18.

<sup>62</sup> Ibid para 19.

<sup>63</sup> Ibid paras 4 and 22.

Supreme Court of Appeal — the boys against its substantive findings of liability and Dr Dey against the damages awarded. The Supreme Court of Appeal held that the boys were liable for defamation, but they refused to consider Dr Dey’s dignity claim on the grounds that doing so would amount to an impermissible duplication of causes of action. Notwithstanding that they removed one of the grounds of the boys’ liability, Dr Dey’s damages award remained unchanged.<sup>64</sup>

The boys then appealed once more to the Constitutional Court. They argued that the image was not defamatory of Dr Dey, but that even if it was, their publication of the image was not wrongful because they had lacked the requisite *animus iniuriandi* to defame him. They pleaded that they had not known that their conduct was unlawful, and that they had intended the publication as a joke.<sup>65</sup> Dr Dey argued that the image was defamatory of him, in the main because it was defamatory per se, and in the alternative because it implied that he: masturbated either in public or in the presence of another person; was prone to indecent exposure; was of a low moral character; was in a homosexual relationship with the principal; and/or was a homosexual.<sup>66</sup>

There were several issues that the Constitutional Court was called upon to address. This section only focuses on the Court’s findings concerning (b) whether the image was defamatory of Dr Dey and (c) whether the boys lacked the requisite intention to defame him. These two issues speak directly to propositions (i) and (ii) respectively, which were introduced in section II above.

(b) *Defamatoriness*

The ten justices of the Constitutional Court who heard the matter were divided as to whether the image was defamatory of Dr Dey. Six (Brand AJ writing for the majority with Khampepe J, Mogoeng J, Moseneke DCJ, Ngcobo CJ and Nkabinde J concurring) found that it was, whereas four (in one judgment co-authored by Froneman and Cameron JJ and another authored by Yacoob J with Skweyiya J concurring, the latter of whom also wrote a separate judgment) found that it was not.<sup>67</sup>

It bears remembering that the onus falls on the plaintiff to establish defamatoriness. The two-stage enquiry stipulates that the meaning of the statement must be objectively determined,

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<sup>64</sup> Ibid paras 24–6.

<sup>65</sup> Ibid para 23.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid paras 5–6.

whereafter the court must decide whether that meaning would probably cause the reasonable observer to think less of the plaintiff.<sup>68</sup> Concerning the first stage of the enquiry, namely whether the image bore a defamatory meaning, the majority held that it did because it associated the plaintiff with the indecent situation that the picture portrayed.<sup>69</sup> As for the second step, whether the image would probably have defamed Dr Dey, Brand AJ said:

the whole purpose and effect of the association created by the picture [was] to tarnish the image of the two figures representing authority; to reduce that authority by belittling them and by rendering them the objects of contempt and disrespect; and to subject these two figures of authority to ridicule in the eyes of the observers who would predominantly be learners at the school. This means that the average person would regard the picture as defamatory of Dr Dey.<sup>70</sup>

The boys contended that the image did not undermine the esteem in which Dr Dey was held by others because the reasonable observer would have recognised that the image was simply a silly joke and a schoolboy prank.<sup>71</sup> However, the majority stressed that the objective nature of the test for defamatoriness rendered it irrelevant what any actual observers thought of the image. Rather, if the reasonable observer would have interpreted the image to be degrading, hurtful, insulting or offensive, then it was defamatory.<sup>72</sup> Concerning the influence of humour under the defamatoriness enquiry, Brand AJ surmised that the true question was whether the reasonable observer would, although laughing, understand the image to be belittling the plaintiff:

Everyday experience tells us that jokes are often intended to and are frequently more effective in destroying the image of those at whom they are aimed. If the joke then achieves that purpose, it is defamatory, even when it is hilariously funny to everyone, apart from the victim.<sup>73</sup>

Therefore, Brand AJ held that even though the image might have been hilarious to most of the learners at the school, the reasonable learner would have concluded that the image was funny *precisely because* it was defamatory of Dr Dey.<sup>74</sup>

The minority disagreed with the majority on the issue of defamatoriness. For an image to defame another ‘it must in the eyes of a reasonable observer undermine the status, good name or reputation of that person.’<sup>75</sup> Like the majority, the minority correctly held that there need

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<sup>68</sup> Ibid para 96.

<sup>69</sup> Ibid paras 101–5.

<sup>70</sup> Ibid para 107.

<sup>71</sup> Ibid para 110.

<sup>72</sup> Ibid para 113.

<sup>73</sup> Ibid para 114.

<sup>74</sup> Ibid para 115.

<sup>75</sup> Ibid para 160.

not be any actual impairment of the plaintiff's reputation. Instead, the standard of proof in this regard is the probability of injury.<sup>76</sup> However, the minority questioned whether the reasonable observer, contextualised to be the reasonable observer in the all-boys high school environment in which the image was published, would probably have thought less of Dr Dey as a result of viewing the blatantly childish image.<sup>77</sup>

The minority struggled to see how the image would have been considered defamatory of Dr Dey by the average reasonable person viewing the image in the context of an all-boys high school, for reasons that are explored more fully in Chapter 4 below. In the main, Froneman and Cameron JJ held that, instead of establishing a probability of reputational damage, the image merely had a tendency to defame. This lower threshold was, according to them, insufficient to satisfy the test for defamatoriness.<sup>78</sup> As for the actual content of what the image portrayed, Yacoob J took issue with the majority's finding that the image conveyed the imputation of Dr Dey as having 'low, seedy values and ... indecent sexuality.'<sup>79</sup> To the extent that the image depicted two men engaged in sexual activity, such activity could not — without more — be considered indecent, for homosexual activity would have been recognised as entirely legitimate in 2006 when the facts of the case arose.<sup>80</sup>

Even though the majority and the minority differed with respect to their factual findings on the issue of defamatoriness in the case, both sides clearly engaged with the possibility that the humorous nature of the impugned publication could serve to influence the defamatoriness enquiry. *Le Roux*, therefore, clearly endorsed proposition (i), namely that jest is a factor capable of influencing the defamatoriness enquiry.

(c) *Intention*

Considering that the minority deemed the image not to be defamatory of Dr Dey, the plaintiff's case failed in their eyes and that was the end of the matter. Neither Froneman and Cameron JJ nor Yacoob J went on to consider whether jest could also serve as a defence rebutting the presumption of the defendant's *animus iniuriandi*.<sup>81</sup> However, having found the image to be defamatory of Dr Dey, the majority then proceeded to consider the issue. The boys pleaded

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<sup>76</sup> Ibid.

<sup>77</sup> Ibid paras 43, 55–69 and 162–9.

<sup>78</sup> Ibid paras 169–73.

<sup>79</sup> Ibid para 59.

<sup>80</sup> Ibid para 62.

<sup>81</sup> Ibid para 69.

that they ‘had intended the publication as a joke.’<sup>82</sup> Further, they argued that they had not appreciated the wrongfulness of their conduct. Hence, they contended that they lacked *animus iniuriandi* because they had not directed their will at defaming Dr Dey, nor were they conscious of the wrongfulness of their conduct.<sup>83</sup> The majority rejected their argument.

Concerning direction of will, the majority found that the boys’ plea of jest spoke only to their motive and was thus incapable of excluding *animus iniuriandi*, because one’s motive does not necessarily correlate with one’s legal intention, regardless of the semantic conflation between the two.<sup>84</sup> Nonetheless, according to the majority, even if the boys’ motive had been to raise a laugh, they surely must have foreseen the possibility that their joke might defame Dr Dey, reconciled themselves with this possibility, and published the image anyway. Hence, they would have had the legal intention to defame in the form of *dolus eventualis*.<sup>85</sup> Concerning their alleged absence of consciousness of wrongfulness, the majority found that the evidence — ironically submitted by the boys themselves — clearly showed that they themselves knew that what they were doing, in publishing the image, was wrongful.<sup>86</sup>

So, the majority of the Constitutional Court seemingly entertained, even if it did not necessarily endorse, the uncoupled approach to propositions (i) and (ii), namely that jest could still serve to rebut the presumption of the defendant’s intention *even if* it fails to negate the defamatoriness of the publication at the earlier stage.<sup>87</sup> Given that the boys’ defence of jest did not succeed on the facts of the case, the majority’s statements entertaining proposition (ii) can only be considered *obiter*. However, just as De Villiers prophesied in 1899 and Visser reiterated in 2007, although jest theoretically could serve to rebut the presumption of the defendant’s intention, the defendant’s prospects of success along such an avenue are rather slim due to the wide-reaching nature of the standard of intention that is *dolus eventualis*.<sup>88</sup>

#### IV POST-*LE ROUX*

*Le Roux* serves as persuasive authority from the Constitutional Court that jest can serve both (i) as a factor capable of influencing the defamatoriness of the defendant’s statement, and (ii) as a defence capable of rebutting the presumption of the defendant’s *animus iniuriandi*.

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<sup>82</sup> Ibid para 23.

<sup>83</sup> Ibid para 130.

<sup>84</sup> Ibid para 131.

<sup>85</sup> Ibid paras 131–3.

<sup>86</sup> Ibid paras 134–5.

<sup>87</sup> Ibid paras 110 and 129–37.

<sup>88</sup> De Villiers op cit note 25 at 195; Visser op cit note 57 at 1189.

Notwithstanding the Court's implicit adoption of the uncoupled approach to jest, jest is yet to succeed in either capacity in an action for defamation. That is, it has failed to render a prima facie defamatory statement not defamatory and it has failed to rebut the presumption of the defendant's intention. This begs the question: where to from here?

(a) *Cases*

Since 2011, there has only been one other case that has considered jest in the context of the South African law of defamation: *Pudney v Engler*.<sup>89</sup> It appears as though Ndita J, a single judge writing for the Western Cape High Court in an unreported judgment, adopted the reasoning of the majority in *Le Roux* wholesale. The facts of the case are as follows.

The plaintiff, Norman Pudney, while performing as his self-developed character Puddles the Clown riding a unicycle, had his image taken by Master File Corporation, a business that provides a database of stock images to its users.<sup>90</sup> One such user, *For Him Magazine*, used the image of Puddles the Clown in an article titled '*FHM* calls Bullshit' in which '25 things that suck' were mocked and derided inter alia airline fares, car guards and clowns. Of clowns, many derogatory things were said — namely that they often resemble grown men with long-term *tik* habits, dress like transvestites from hell and scare defenceless children.<sup>91</sup> Pudney sued the magazine for defamation.

Although the image of the clown riding a unicycle did not bear a defamatory meaning by itself, Ndita J found that the publication was defamatory when the image was viewed together with the text that appeared alongside it. According to her, the reasonable reader would tend to think less of the plaintiff if they took seriously what the article stated.<sup>92</sup> There was some doubt as to whether it could be said that the article defamed Mr Pudney specifically. However, upon hearing evidence that several readers of the magazine immediately recognised the image as being that of Puddles the Clown, who was knowingly portrayed by Mr Pudney, the judge found that the defamatory imputations were capable of being and in fact were understood to be referring to the plaintiff.<sup>93</sup>

The defendants raised the defence of jest as a defence rebutting the presumption of their *animus iniuriandi*. They argued that it was not their intention to defame Mr Pudney because

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<sup>89</sup> *Pudney* supra note 6.

<sup>90</sup> *Ibid* para 3.

<sup>91</sup> *Ibid* para 4.

<sup>92</sup> *Ibid* para 12.

<sup>93</sup> *Ibid* paras 13–23.

*FHM* often features satirical articles aimed primarily, though not exclusively, at raising a laugh.<sup>94</sup> However, relying almost verbatim on the reasoning of the majority judgment in *Le Roux* — specifically that the defendant’s mere motive to raise a laugh is insufficient to rebut the presumption of their intention, even in the form of *dolus eventualis* — Ndita J held that their defence of jest failed.<sup>95</sup> Mr Pudney was ultimately awarded R60 000 in damages.<sup>96</sup>

So it appears that the defence of jest rarely succeeds in practice. It has failed either to neuter the defamatoriness of the impugned publication or to rebut the presumption of the defendant’s *animus iniuriandi* in all three cases in which it has been raised to date in South Africa: *Masch*, *Le Roux* and *Pudney*. This does not bode well for the future of jest in defamation cases involving allegedly humorous publications, considering the precedential and normative force of Constitutional Court judgments.

(b) *Academic commentary*

Neethling, Potgieter and Roos — in a textbook under a separate title, but building on Neethling and Potgieter’s earlier work with the late PJ Visser as co-author — maintain that if the defendant can prove that they did not direct their will at injuring the plaintiff’s reputation, then theoretically they should be able to escape liability by rebutting the presumption of *animus iniuriandi*.<sup>97</sup> However, because the court in *Masch* did not follow this approach — holding instead that the reasonable bystander must also have regarded the publication as a joke — the defendant can seemingly be held liable ‘irrespective of the actual absence or presence of *animus iniuriandi*’.<sup>98</sup> The authors contend that this coupled approach to jest cannot be correct. If jest is to serve as a defence capable of rebutting the presumption of the defendant’s *animus iniuriandi*, then its success must stand or fall by the standards set under that enquiry alone.<sup>99</sup>

To the contrary, Van der Walt and Midgley contend that, in addition to being a relevant consideration under the defamatoriness enquiry, jest should rather serve as a defence capable of rebutting the presumption of the defendant’s wrongfulness.<sup>100</sup> The authors submit that the enquiry into lawfulness would better cater for the subtle nuance between legitimate and illegitimate jokes, by allowing the dictates of public policy to determine whether the defendant

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<sup>94</sup> Ibid paras 24–7.

<sup>95</sup> Ibid paras 28–33.

<sup>96</sup> Ibid paras 63–5. Pudney originally sued the defendants for R100 000.

<sup>97</sup> Neethling, Potgieter & Roos op cit note 3 at 243–4.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid at 243 footnote 412.

<sup>100</sup> Van der Walt & Midgley op cit note 3 para 134.

should be vested with liability in a particular case.<sup>101</sup> It can be very difficult to argue that certain kinds of humour, like satire and parody, were created unintentionally — ie without *dolus eventualis*. Similarly, there may be other classes of jokes which, although they injure the plaintiff's reputation, nonetheless deserve to be insulated from the law of defamation. The creators of such defamatory jokes would be protected if society deemed them lawful.<sup>102</sup>

## V CONCLUSION

This chapter traced the chronological development of jest in the South African law of defamation. Section II surveyed the historical treatment of jest by prominent academics and judges throughout the pre-1900s, the twentieth century and the early 2000s. Section III introduced the *locus classicus* of jest as it currently stands: the Constitutional Court case of *Le Roux*. Following a summary of the facts of the case, the Court's engagement with jest under the elements of defamatoriness and intention was assessed. Section IV reflected on the prospects for jest post-*Le Roux*. It identified the unreported case of *Pudney* as proof that the reasoning of the majority in *Le Roux* is likely to be adopted verbatim in future defamation cases involving allegedly humorous publications and introduced a selection of the academic commentary post-*Le Roux* that questions both the efficacy and the true location of jest as a defence rebutting either the presumption of intention or the presumption of wrongfulness. Following the Constitutional Court's implicit uncoupling of propositions (i) and (ii), Chapter 4 below evaluates the fate of humour under the defamatoriness enquiry. Chapter 5 then assesses the viability of jest as a defence to an action for defamation.

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<sup>101</sup> Ibid.

<sup>102</sup> Ibid para 142 footnote 5.

## CHAPTER 4 HUMOUR UNDER DEFAMATORINESS

### I INTRODUCTION

The previous chapter established that jest falls to be considered both under the defamatoriness enquiry and at the defences stage. The purpose of this chapter is to address the former, namely the influence of humour under the defamatoriness enquiry.

Section II introduces (a) three predominant theories of humour that seek to explain why a communication is considered funny. They are the superiority, release and incongruity theories. The section demonstrates that (b) these three theories are not mutually exclusive. Therefore, the funniness of a communication is often explicable in terms of all three, albeit to varying degrees. It cautions that (c) even distasteful humour can be funny. Section III investigates the extent to which the three theories of humour featured in the multiple judgments of the Constitutional Court in the seminal case involving humour in the South African law of defamation: *Le Roux v Dey*.<sup>1</sup> It demonstrates that whereas (a) the minority attributed the humour behind the impugned image to the incongruity theory, (b) the majority attributed the communication's funniness to the superiority theory. This aligns *Le Roux* with (c) the trend identified in other common law jurisdictions, namely that superiority humour is more likely to attract liability for defamation, as will be explained below.

Section IV explains that the apparent correlation between superiority humour and defamatory liability stems from (a) the significant overlap between superiority humour, which is belittling, and the categorisation of statements as defamatory because they 'exposed the plaintiff to hatred, contempt or ridicule'.<sup>2</sup> It problematises this test for defamatoriness because (b) there exists no necessary connection between the plaintiff's exposure to ridicule and their probable reputational injury, which is the harm that the law of defamation purportedly guards plaintiffs against. The result is that the test for defamatoriness is more likely to be satisfied, and unduly so, by instances of superiority humour. The section further criticises the majority's finding of defamatoriness in *Le Roux* on the ground that (c) the majority erroneously conflated the action for defamation with the action for insult, which led it to remedy the injury to Dr Dey's dignity by way of liability for defamation notwithstanding that Dr Dey had suffered no probable reputational injury. Section V concludes the chapter.

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<sup>1</sup> 2011 (3) SA 274 (CC).

<sup>2</sup> *Parmiter v Coupland* (1840) 6 M & W 105 at 108.

## II THEORIES OF HUMOUR

Elwyn Brooks White says that '[h]umor can be dissected as a frog can, but the thing dies in the process and the innards are discouraging to any but the pure scientific mind.'<sup>3</sup> Thus the old saying rings true: a joke explained is a joke killed. However, despite being a tedious nut to crack, the interdisciplinary literature on humour can be classified into three broad focus areas: inventories, consequences and theories.<sup>4</sup> This section does not address humour's inventories — its most popular vehicles being parody, pranks, puns, riddles and sarcasm; nor does it address the beneficial and deleterious consequences of humour. Instead it (a) introduces three predominant theories of humour that seek to explain why certain communications are deemed funny.<sup>5</sup> They are the (i) superiority, (ii) release and (iii) incongruity theories.<sup>6</sup> Thereafter, it (b) addresses the complex interplay between the three theories and (c) cautions against the blanket dismissal of distasteful humour.

### (a) *The three theories*

#### (i) Superiority

The superiority theory is attributed to the likes of Aristotle, Cicero, Descartes, Plato, Socrates and Thomas Hobbes.<sup>7</sup> It suggests that humour is simply 'a mechanism of disparaging others to enhance one's own sense of well-being.'<sup>8</sup> According to the superiority theory, audience members supposedly feel better about themselves by witnessing the suffering, silliness or stupidity of others, namely the object(s) of the joke, and they express their delight in this feeling of comparative superiority through laughter.<sup>9</sup> The German noun '*schadenfreude*', defined as the pleasurable feeling derived from someone else's misfortune, neatly captures the essence of

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<sup>3</sup> EB White *The Second Tree from the Corner* (1941) at 173.

<sup>4</sup> LE Little 'Just a joke: Defamatory humor and incongruity's promise' (2011) 21 *Southern California Interdisciplinary Law Journal* 95 at 100.

<sup>5</sup> A Borgella 'Science deconstructs humor: What makes some things funny?' *The Conversation* 2 November 2016, available at <https://theconversation.com/science-deconstructs-humor-what-makes-some-things-funny-64414>, accessed on 15 May 2022.

<sup>6</sup> Although this tripartite division remains the gold standard, the more contemporary benign violation theory has garnered increased attention. Given its novelty, this theory falls outside of the scope of this dissertation. See T Veatch 'A theory of humor' (1998) 11 *Humor: International Journal of Humor Research* 161; PA McGraw & C Warren 'Benign violations: Making immoral behavior funny' (2010) 21 *Psychological Science* 1141.

<sup>7</sup> LE Little 'Regulating funny: Humor and the law' (2009) 94 *Cornell Law Review* 1235 at 1245.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid* at 1290.

superiority humour.<sup>10</sup> The superiority theory also explains why people sometimes laugh at demeaning ableist, homophobic, racist and sexist jokes — even though they might make every conscious effort not to find such jokes funny.<sup>11</sup>

### (ii) Release

The release theory is attributed to the likes of Alexander Bain, Herbert Spencer and Sigmund Freud.<sup>12</sup> It suggests that humour is simply a mechanism through which one can safely engage with ‘repressed sources of pleasure, pressure or anxiety.’<sup>13</sup> Such sources change over time, but typical examples include scatology amongst children, sex amongst teenagers and existentialism amongst adults.<sup>14</sup> According to the release theory, laughter is the physical release of nervous energy experienced in response to these sensitive subjects being canvassed.<sup>15</sup> Instead of openly engaging with the general uneasiness surrounding taboo topics such as faeces, sex and death, release humour allows the audience to process and express their ambivalent emotions towards them.<sup>16</sup>

### (iii) Incongruity

The incongruity theory is attributed to the likes of Immanuel Kant and Arthur Schopenhauer, amongst others.<sup>17</sup> It suggests that humour arises through the juxtaposition of two inconsistent phenomena by placing them in an unfamiliar context, or altering the audience’s point of view towards them, or creating confusion about the context in which the phenomena were used.<sup>18</sup> Incongruity humour is most evident in so-called priming jokes, where the joke-teller primes the audience with markers for a scenario that are later contradicted. The audience is invited to suspend disbelief and to agree with the setup presented by the jokester. Audience members then quickly try to spot the incongruity and expend energy in trying to resolve it.<sup>19</sup> According to the incongruity theory, this process is enjoyable because it provides the audience with

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<sup>10</sup> Definition of ‘schadenfreude’ *Merriam-Webster English Dictionary*, available at <https://www.merriam-webster.com/dictionary/schadenfreude>, accessed on 13 February 2023.

<sup>11</sup> LE Little *Guilty Pleasures: Comedy and Law in America* (2018) at 10.

<sup>12</sup> Little op cit note 7 at 1249.

<sup>13</sup> Ibid. Footnotes omitted.

<sup>14</sup> Ibid at 1250.

<sup>15</sup> Little op cit note 4 at 101.

<sup>16</sup> Ibid at 103–4.

<sup>17</sup> Little op cit note 7 at 1245.

<sup>18</sup> Little op cit note 4 at 105.

<sup>19</sup> Ibid at 106.

intellectual stimulation. Laughter is the physical manifestation of the mental delight that audience members feel when they finally ‘get’ the joke.<sup>20</sup>

(b) *The interplay between the three theories*

Although the superiority and release theories are useful, there are countless examples of communications that either express superiority or release anxiety which are not considered funny at all.<sup>21</sup> As such, on their own, the superiority and release theories cannot account for the funniness of a communication. Thus, the consensus amongst humour scholars seems to be that the presence of incongruity is a necessary condition for humour.<sup>22</sup> However, humour scholars also tend to agree that much like the superiority and release theories, the mere presence of incongruity alone is insufficient to render a communication funny.<sup>23</sup> Rather, in addition to incongruity being a necessary condition for humour, *something extra* is required to distinguish humorous incongruities from non-humorous ones.<sup>24</sup>

Scholars have identified several further conditions that will render an incongruity humorous. Examples include the incongruity (1) occurring suddenly,<sup>25</sup> (2) appearing in a playful and non-threatening context,<sup>26</sup> or (3) ‘making sense’ — ie being capable of resolution.<sup>27</sup> Where an incongruity is introduced suddenly, it catches the audience off guard. The element of surprise can contribute to the communication’s shock factor and humorous potential.<sup>28</sup> Similarly, if the audience is given social cues that an incongruous situation has been created in good faith to raise a laugh, then it is more likely to accept the jokester’s invitation to resolve the incongruity in its search for the humour behind the communication.<sup>29</sup>

The upshot of this whistle-stop tour of humour theory is that a communication will only be deemed funny *if* it necessarily contains an element of incongruity and something extra that renders the incongruity humorous. Once these necessary conditions for humour have been

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<sup>20</sup> Ibid at 107–9.

<sup>21</sup> For example, bullying (superiority) or throwing human excrement at a colonial relic (release) are not, at least without an element of incongruity, funny.

<sup>22</sup> RA Martin *The Psychology of Humor: An Integrative Approach* (2007) at 63 and 72.

<sup>23</sup> Ibid at 64. For example, many magic tricks inspire awe and not laughter.

<sup>24</sup> Ibid at 64–5.

<sup>25</sup> JM Suls ‘Cognitive processes in humor appreciation’ in PE McGhee & JH Goldstein (eds) *Handbook of humor research, Vol. 1: Basic issues* (1983).

<sup>26</sup> MK Rothbart ‘Incongruity, problem-solving and laughter’ in AJ Chapman & HC Foot (eds) *Humor and Laughter: Theory, Research, and Applications* (1976).

<sup>27</sup> TR Shultz ‘The role of incongruity and resolution in children’s appreciation of cartoon humor’ (1972) 13 *Journal of Experimental Child Psychology* 456.

<sup>28</sup> Martin op cit note 22 at 64. Although, this further condition is questionable when one considers that being hit by a car while walking on the sidewalk is both sudden and incongruous yet (usually) not funny.

<sup>29</sup> Ibid at 65–6.

satisfied, elements of the superiority and/or release theories could contribute to how funny the communication is. A tentative formula for funny, therefore, might look something like this:

$$\text{Funny} = \underbrace{\text{Incongruity} + \text{something extra}}_{\text{Necessary conditions}} + \underbrace{\text{Superiority and/or Release}}_{\text{Additional elements}}$$

However, three pertinent observations must be made to further qualify this formula. First, the three theories of humour are not mutually exclusive. That is, upon closer inspection, most jokes can be explained in terms of a combination of all three theories simultaneously.<sup>30</sup> Secondly, where the three theories do overlap in accounting for the funniness of any given joke, the elements of incongruity, release and superiority humour will be present to varying degrees. Whereas a portion of the joke’s funniness will necessarily be explainable in terms of the incongruity theory — because incongruity is a necessary condition for humour — the weight of the joke’s funniness could be attributable either to the superiority or to the release theory.<sup>31</sup> Finally, the attribution of the humour behind a joke to any one or more of the three theories rests, in large measure, upon one’s own subjective interpretation of that joke. Whether the listener homes in on a joke’s witty play on words (incongruity), its anxiety-inducing subject matter (release), or its aggressive and disparaging undertones (superiority) is often a matter of personal predilection.<sup>32</sup> To elucidate these three observations by way of an example, consider the following joke delivered by the comedian Jimmy Carr at a comedy show:

‘They say that there is safety in numbers. Yeah? Tell *that* to six million Jews!’<sup>33</sup>

Given that incongruity and something extra are necessary conditions for humour, a portion of this communication must be explicable in terms of the incongruity theory to be deemed funny. Such an explanation might read as follows: ‘It is incongruous to believe *both* that there is safety in numbers *and* that six million Jews were systematically exterminated in the Holocaust. Jimmy’s sudden juxtaposition of a comforting catchphrase (there is safety in numbers) with such a discomfoting event (the Holocaust), in the playful and non-threatening context of a

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<sup>30</sup> Little op cit note 4 at 101–2.

<sup>31</sup> Little op cit note 7 at 1251.

<sup>32</sup> Little op cit note 4 at 158.

<sup>33</sup> J Carr ‘Telling jokes’ *YouTube* 12 November 2009, available at <https://www.youtube.com/watch?v=ywbPjmZ96Ic>, accessed on 15 May 2022.

comedy show, induced me to search for the incongruity contained in the communication. It took me a moment to catch on, but I laughed once I solved the puzzle.’

However, the three theories of humour are not mutually exclusive. So, in addition to the joke’s incongruity, the joke’s funniness could also be explained in terms of the superiority theory: ‘I feel superior to the Jewish people who, although six-million-strong, were easily killed in the Holocaust, so I laughed at their weakness and suffering.’ Conversely, it might also be explained by the release theory: ‘The Holocaust, anti-Semitism and death are all topics that I find uncomfortable and taboo, so I laughed nervously to release this awkward tension.’ Furthermore, the elements of incongruity, superiority and release humour may not be present in equal proportions. The degree to which each theory accounts for the funniness of the joke will differ from person to person. Whereas one might deem its incongruity to be determinative, another might deem its superiority to be decisive.

(c) *A note on distasteful humour*

In closing this section, it is worth rebutting a common contention levelled in contemporary discourse concerning humour. Some argue that certain communications, regardless of whether they were genuinely aimed (and perhaps even successful) at raising a laugh, concern subject matter that is so offensive and distasteful that they are categorically not funny.<sup>34</sup> It is submitted here that such protestations can, and should, only be understood as being declarations of one’s own assessment of the lack of humour behind the impugned communication. They cannot be understood as being outright declarations that such communications can never be funny *at all*.<sup>35</sup>

A person may dislike the content of a joke, disagree with the manner of its presentation and treat the jokester with concomitant disdain, but such responses do not disqualify the communication from being understood as a joke by others, nor do they neuter the communication’s inherent potential for being funny altogether.<sup>36</sup> As such, the three theories of humour remain useful tools for explaining why certain communications are deemed funny. The extent to which the three theories of humour featured in the multiple judgments of the Constitutional Court in *Le Roux* is assessed in section III below.

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<sup>34</sup> L Kant & E Norman ‘You must be joking! Benign violations, power asymmetry, and humor in a broader social context’ (2019) 10 *Frontiers in Psychology*.

<sup>35</sup> Of course, it may be the case that some are indeed making such categorical claims about particularly sensitive topics, namely the Holocaust, 9/11 and rape.

<sup>36</sup> For a well-known comedian’s views on the topic, see R Gervais *Twitter* 31 December 2018, available at <https://twitter.com/rickygervais/status/1079784120945967104?lang=en>, accessed on 15 May 2022.

### III HUMOUR IN *LE ROUX*

It bears remembering that the Constitutional Court split on the issue of defamatoriness in this case. The minority of four found that the context in which the publication arose rendered its meaning and impact patently humorous and, therefore, not defamatory, whereas the majority of six found that its jocular nature failed to negate the defamatoriness thereof.<sup>37</sup>

Following a brief restatement of the facts of the case, this section analyses the presence of the release, incongruity and superiority theories throughout the Court's multiple judgments. This analysis is used to tease out the link between the judges' differing interpretations of the humour behind the impugned publication and their opposing findings on the issue of defamatoriness. Subsection (a) argues that the minority's penchant for incongruity humour led Froneman and Cameron JJ, as well as Yacoob J, to interpret the publication as being playful and non-threatening — and, therefore, not defamatory. Conversely, subsection (b) argues that the majority's sensitivity to superiority humour led Brand AJ to interpret the publication as being bullyish and humiliating — and therefore defamatory. Subsection (c) comments that this aligns *Le Roux* with the trend identified in other common law jurisdictions, namely that superiority humour is more likely to attract liability for defamation.

To recapitulate the facts of *Le Roux*, three high school students at Hoërskool Waterkloof in Pretoria were involved, to varying degrees, in the manufacture and dissemination of an image depicting their school principal and one deputy principal, Dr Dey, naked and engaged in a form of intimate sexual activity. The original image, sourced from an undisclosed website, depicted two male bodybuilders sitting next to one another, the one with their right leg draped over the left leg of the other. Both bodybuilders had their own hands in the vicinity of their own respective genitals, but the school's official crest had been strategically pasted over the bodybuilders' nether regions, thereby masking any explicit nudity. The faces of the two bodybuilders had also been partially removed and those of the two school leaders superimposed onto them.<sup>38</sup> Dr Dey successfully sued the boys for defamation in both the High Court and the Supreme Court of Appeal. The boys then appealed to the Constitutional Court, which split six to four in Dr Dey's favour on the issue of defamatoriness.<sup>39</sup>

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<sup>37</sup> *Le Roux* supra note 1 paras 5–6.

<sup>38</sup> *Ibid* paras 12–14, 98 and 155.

<sup>39</sup> *Ibid* paras 4–6.

Elements of the release theory of humour undoubtedly feature throughout the Court's multiple judgments. The image in question depicted two men engaged in sexual conduct of a seemingly homosexual nature. Both sex and homosexuality are, unfortunately, still considered taboo topics—especially in the context of an all-boys high school. Attempts to address either of them typically elicit awkward silence or anxious laughter, largely because most teenage boys undergo puberty, become sexually active and experiment with their sexuality during their high school years.<sup>40</sup> The presence of release humour in *Le Roux* is thus axiomatic, and it will receive no further attention here. Of greater interest, at least for the purpose of this section, is the degree to which incongruity and superiority humour featured in the majority and minority judgments, and the extent to which the judges' differing interpretations of the humour behind the image influenced their respective and conflicting findings on the issue of defamatoriness.

(a) *The minority judgment: Incongruity humour*

Incongruity, which arises through the sudden or subtle juxtaposition of two inconsistent phenomena by placing them in an unfamiliar context, featured prominently in the publication. So obvious was the makeshift quality of the image that Yacoob J described it as being quite clearly 'a clumsy effort at manipulation.'<sup>41</sup> Froneman and Cameron JJ also commented on the manipulation's shoddiness. The heads of both Dr Dey and the school principal were misaligned with and disproportional to the bodies of the two bodybuilders.<sup>42</sup> Remnants of the bodybuilders' hair were still visible at the edges of the insets, and the face of Dr Dey visibly differed in size to that of the principal.<sup>43</sup> There was nothing subtle about the juxtaposition of the schoolteachers' heads with the explicit image. Rather, it was a 'crude pastiche'<sup>44</sup> that sought to mimic a similar creation by a schoolboy character in the popular cartoon television series, *South Park*.<sup>45</sup>

In addition to its garish composition, the image juxtaposed two inconsistent phenomena. Dr Dey was a well-respected teacher and figure of authority at the school. He was the deputy principal responsible for discipline, a devout Christian and a self-identifying heterosexual who would typically have been both formally dressed and viewed in a non-sexual

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<sup>40</sup> MJ Kehily & A Nayak "'Lads and Laughter": Humour and the production of heterosexual hierarchies' (1997) 9 *Gender and Education* 69.

<sup>41</sup> *Le Roux* supra note 1 para 55.

<sup>42</sup> *Ibid* para 164.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid* paras 13 and 155.

light within the school environment.<sup>46</sup> As such, his appearance in the sexual scenario depicted by the image, sans any clothing, would undoubtedly have been quite jarring to those who viewed it.<sup>47</sup>

Although incongruity is a necessary condition for humour, incongruity alone is insufficient to render a publication humorous. Something extra is required. The incongruity must have occurred suddenly, been capable of resolution or appeared in a playful and non-threatening context. For the minority of the Constitutional Court, these further conditions were satisfied.

Those who passed by the school noticeboard would have been confronted suddenly by the incongruous image, which would have created confusion amongst the learners and led them to wonder why such an outlandish image had been placed on the school's noticeboard, which is typically reserved for the communication of official school-related announcements.<sup>48</sup> However, the image's incongruous juxtaposition of the two inconsistent phenomena was capable of being easily resolved by 'making sense' of the image as poking fun at the two serious figures of authority within the school environment. The presence of the school badge clearly indicated that the joke was aimed at the school leaders qua their professional work capacities.<sup>49</sup>

The context in which the image appeared was also considered playful and non-threatening. In disagreeing with the Supreme Court of Appeal's finding that the identities of the authors of the image would have been unknown to whomever viewed it, Yacoob J stressed that the image's sloppy composition, its circulation amongst the children at the school and its placement on the school's noticeboard rendered it highly improbable that those who viewed it would have thought it to have been created by an adult, let alone placed on the noticeboard by a schoolteacher.<sup>50</sup> So too for Froneman and Cameron JJ, 'the likely childish origins of the image would, without doubt have played a role in, if not determined, the likely viewer's assessment and understanding of the image.'<sup>51</sup> The school setting itself was 'pivotal to determining the meaning of the image',<sup>52</sup> because the 'contextually average reasonable school viewer, learner or teacher, knew better'<sup>53</sup> than to take such a schoolboy prank seriously.

The childish origins of the image, its appearance within the school environment and its crass composition rendered the context in which the incongruity appeared playful and non-

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<sup>46</sup> Ibid para 159.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid para 165.

<sup>49</sup> Ibid paras 57, 64–5 and 158–9.

<sup>50</sup> Ibid paras 55–6.

<sup>51</sup> Ibid para 162.

<sup>52</sup> Ibid para 163.

<sup>53</sup> Ibid para 167.

threatening. Dr Dey was known to be neither a homosexual nor sexually promiscuous.<sup>54</sup> Therefore, although the image associated Dr Dey with the conduct of the two bodybuilders, its fantastical composition would have been so obvious to the reasonable observer that nobody would have interpreted the image as asserting that Dr Dey had actually engaged in such conduct.<sup>55</sup> *‘That was why the perpetrators thought what they were doing was funny.’*<sup>56</sup>

This seems to be the clearest indication that the minority attributed the humour behind the publication to the incongruity theory. The creation of the image was thought to ‘result in an enjoyable spectacle.’<sup>57</sup> And it did. Not only was the creator of the image ‘amused by his own handiwork’,<sup>58</sup> but many learners at the school — and at least one teacher — found it funny.<sup>59</sup>

(b) *The majority judgment: Superiority humour*

Notwithstanding the image’s patent incongruity, the majority questioned the playful and non-threatening context in which the image appeared. They homed in on the element of superiority humour implicit in the publication and found that:

the whole purpose and effect of the association created by the picture [was] to tarnish the image of the two figures representing authority; to reduce that authority by belittling them and by rendering them the objects of contempt and disrespect; and to subject [the] two figures of authority to ridicule in the eyes of the observers who would predominantly [have been] learners at the school.<sup>60</sup>

Words such as ‘belittle’, ‘contempt’, ‘disrespect’, ‘reduce’, ‘ridicule’ and ‘tarnish’ all bear connotations to disparagement, which itself forms the cornerstone of superiority humour. According to the superiority theory, it is the disparagement of the joke’s object that is thought to induce comparative feelings of superiority amongst the joke’s audience, which accounts for why many people often find the belittlement and humiliation of others amusing.

The majority stressed that although the primary target of the image might have been the exercise of authority at the school qua Dr Dey in his position as the deputy principal responsible for discipline, the net effect of the publication nonetheless caught Dr Dey’s personal reputation in its web and brought him along for the ride.<sup>61</sup> Notwithstanding the image’s fantastical

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<sup>54</sup> Ibid para 159.

<sup>55</sup> Ibid para 165.

<sup>56</sup> Ibid para 159. Emphasis added.

<sup>57</sup> Ibid para 13.

<sup>58</sup> Ibid para 15.

<sup>59</sup> Ibid para 17.

<sup>60</sup> Ibid para 107.

<sup>61</sup> Ibid para 109.

creation, which made it plain that neither of the bodies in the image were actually those of the two schoolteachers, one of the superimposed faces clearly belonged to Dr Dey.<sup>62</sup> As such, insofar as the juxtaposition of the two inconsistent phenomena depicted in the image could be resolved, the majority remained unconvinced that the reasonable observer would have construed the image as being solely an attack on Dr Dey's exercise of authority at the school, to the exclusion of all else. Rather, the image belittled and humiliated Dr Dey in his personal capacity as well.<sup>63</sup>

Although the majority, like the minority, accepted that the reasonable observer would have understood the image to have probably been created by schoolchildren, and that this was a relevant contextual factor to consider when determining meaning, Brand AJ stressed that children are not exempt from delictual liability.<sup>64</sup> Therefore, the identities of the defendants as schoolchildren did not do enough to render the context in which the image appeared playful and non-threatening.<sup>65</sup>

As for whether the reasonable observer would have understood the image as a joke not meant to be taken seriously, the majority latched onto the distinction between legitimate and illegitimate jest initially propounded by De Villiers,<sup>66</sup> and seized upon by Harms DP in the majority judgment of the Supreme Court of Appeal.<sup>67</sup> According to this dichotomy, jest is only considered legitimate if the object of the joke can laugh along *with* it. Jest is considered illegitimate if the plaintiff is made the butt of a degrading joke told at their own expense, resulting in their being laughed *at*.<sup>68</sup>

The majority deemed the joke illegitimate under the circumstances. They noted that even though '[n]o reasonable person could ever think that the bodies on which the faces [were] pasted were actually those of the principal and Dr Dey',<sup>69</sup> 'and that [Dr Dey] did not, in reality, partake in whatever it [was] that they were doing',<sup>70</sup> the factual impossibility of the situation depicted did not preclude the image from bearing a defamatory meaning. Otherwise satire and parody could never be defamatory.<sup>71</sup> Rather, the majority was alive to the fact that even though the image did not portray an actual event, it would have led the ordinary observer to wonder

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<sup>62</sup> Ibid paras 93 and 98.

<sup>63</sup> Ibid para 109.

<sup>64</sup> Ibid para 117.

<sup>65</sup> Ibid paras 118–19.

<sup>66</sup> M de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) at 195.

<sup>67</sup> *Le Roux v Dey* 2010 (4) SA 210 (SCA) para 9.

<sup>68</sup> *Le Roux* supra note 1 paras 112–13.

<sup>69</sup> Ibid para 98.

<sup>70</sup> Ibid para 103.

<sup>71</sup> Ibid.

why the association between Dr Dey and the bodybuilder's conduct had been drawn, and in turn caused them to ponder whether such an event had indeed occurred off-screen.<sup>72</sup>

Therefore, the image drew a sinister association between Dr Dey and the conduct of the two bodybuilders, leading the reasonable observer to conclude that Dr Dey had either engaged in, or was prone to engaging in, such conduct.<sup>73</sup> For the majority, the explicit association of Dr Dey with the 'embarrassing and disgraceful'<sup>74</sup> situation depicted in the image was precisely what rendered the communication funny in the circumstances, eclipsing even its patent incongruity. Put differently, most of the learners at the school found the picture funny for the very reason that it belittled and ridiculed the principal and vice-principal, thereby making the learners feel comparatively better about themselves.<sup>75</sup>

This seems to be the clearest indication that the majority attributed the humour behind the publication to the superiority theory. In support of its conclusion, the majority alluded to the fact that a friend of the publishers admitted that the image, although funny, was humiliating and demeaning.<sup>76</sup>

(c) *The correlation between superiority humour and liability for defamation*

The analysis conducted in subsections (a) and (b) above reveals that the attribution of the humour behind a given publication to any one of the three theories of humour rests, in large measure, upon one's own interpretation of the joke. The various judgments of the Constitutional Court in *Le Roux* evidence that the interpretation of the humour behind the impugned image differed even between the judges. But why did the majority home in on the superiority aspects of the image and the minority on its incongruity?

According to Suls, when an incongruous joke is created, certain aspects of the joke that might appear aggressive and disparaging at first glance are intended by the jokester not to be taken seriously. Rather, they are necessary evils for priming the audience with an incongruity that can later be resolved.<sup>77</sup> So, where elements of incongruity humour are coupled with superiority humour, the joke's glaring incongruity or outrageous juxtaposition may serve to

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<sup>72</sup> Ibid para 107.

<sup>73</sup> Ibid para 103.

<sup>74</sup> Ibid para 98.

<sup>75</sup> Ibid para 115.

<sup>76</sup> Ibid para 116. Brand AJ correctly disavowed any reliance on this evidence as part of his reasoning that the image was defamatory. He simply mentioned it in support of his conclusion that the image was funny precisely because it belittled and humiliated Dr Dey.

<sup>77</sup> Suls op cit note 25, cited in Martin op cit note 22 at 66.

neuter the joke's elements of superiority humour, causing them to fall by the wayside. This might explain why Froneman and Cameron JJ concluded that the image, albeit tasteless and cruel, was nonetheless an innocent and non-threatening childish prank.<sup>78</sup> Not so for Brand AJ, who concluded that notwithstanding the image's incongruity, it was nonetheless belittling and demeaning of Dr Dey.<sup>79</sup>

The diagnostic exercise conducted above, of linking the theories of humour to the judges' conflicting findings on the issue of defamatoriness in *Le Roux* suggests that superiority humour is more likely to attract liability for defamation. Unfortunately, because there is a dearth of South African defamation cases involving humour, this insight is not easy to confirm conclusively. However, it is worth noting that the split finding on the issue of defamatoriness in *Le Roux* mirrors what Little observes to be a notable correlation between superiority humour and positive findings of defamatoriness that is evident in both American and Australian defamation cases.<sup>80</sup> Where incongruity humour is the order of the day, a prima facie defamatory publication is more likely to attract an innocent interpretation and thereby escape defamatory liability. On the contrary, where superiority humour is detected, a publication is more likely to attract an injurious interpretation and thereby result in liability for defamation.<sup>81</sup>

For this reason, Little argues that the incongruity theory is the most important of the three theories of humour, not only for identifying whether a communication is funny, but also for determining whether its funniness should insulate it from liability for defamation.<sup>82</sup> The presence of incongruity, she argues, serves as a useful indicator for determining the reasonable observer's understanding of the meaning of the publication in question. The more glaring the incongruity, the more likely it will be that a judge will hold that the reasonable observer understood the communication to be a joke — ie not meant to be taken seriously as making any factual claims about the plaintiff.<sup>83</sup> Much evidently rests, therefore, on the capability of judges both to spot, and give weight to, the incongruity implicit in an allegedly defamatory joke.<sup>84</sup>

It might be said that, for the purposes of the defamatoriness enquiry, it does not matter whether the funniness of the impugned statement can be best explained by the superiority,

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<sup>78</sup> *Le Roux* supra note 1 para 163.

<sup>79</sup> *Ibid* para 114.

<sup>80</sup> Little op cit note 4 at 102.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Ibid* at 104.

<sup>83</sup> *Ibid* at 160.

<sup>84</sup> *Ibid* at 99. See also A Carrell 'Joke competence and humor competence' (1997) 10 *Humor: International Journal of Humor Research* 173.

release or incongruity theories. When confronted with humour in a legal setting, judges are not supposed to function as arbiters of societal taste.<sup>85</sup> Their task is not to countenance or denounce certain jokes according to their own, or society's perceived, sense of humour. Instead, their primary task is to determine whether the reasonable observer would have understood the joke as bearing a defamatory meaning that would probably have defamed the plaintiff.<sup>86</sup>

This truism notwithstanding, legal determinations are not without social consequences. Defamation law undoubtedly regulates societal humour, for adverse judgments denouncing certain kinds of humour will have a chilling effect on joke-telling.<sup>87</sup> Where a court holds the defendant liable for making a defamatory joke, the resulting verdict sends a deterrent message to others who might have previously considered making a similar joke.<sup>88</sup> Therefore, when courts draw the line between defamatory and non-defamatory jokes, they *are* essentially acting as arbiters of societal taste, for they are making a value judgment as to the kinds of humour that will and will not be tolerated by the legal system.<sup>89</sup>

American humourist Erma Bombeck says that 'there is a thin line that separates laughter and pain, comedy and tragedy, humor and hurt.'<sup>90</sup> The strength of a joke often rests on how delicately it toes that line, and jokes that draw on our edgiest sensitivities attract deeper appreciation and heartier laughter.<sup>91</sup> Yet such jokes also ignite the itch to censor and to protect, and there is 'some point at which the tickle becomes a scratch.'<sup>92</sup> Such is the tricky task of regulating humour in the law of defamation. It appears that the line between non-defamatory and defamatory jokes is crossed when the funniness of the joke in question is primarily attributed to the superiority theory. This correlation warrants further examination and criticism.

#### IV RIDICULE AND REPUTATIONAL INJURY

The first issue for determination, which has already been discussed in part, is whether superiority humour is more likely to satisfy the test for defamatoriness. If so, that would explain the correlation between superiority humour and liability for defamation. However, a related

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<sup>85</sup> See the apt remarks of Sachs J in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC) paras 70, 75 and 107–8.

<sup>86</sup> *Le Roux* supra note 1 para 114.

<sup>87</sup> CD Glasberg 'Who has the last laugh – a look at defamation in humor' (1989) 9 *Loyola of Los Angeles Entertainment Law Review* 381 at 398.

<sup>88</sup> Little op cit note 4 at 117.

<sup>89</sup> *Le Roux* supra note 1 para 119.

<sup>90</sup> E Bombeck *If Life Is a Bowl of Cherries, What Am I Doing in the Pits?* (1978) at 198.

<sup>91</sup> LE Little 'Judicial regulation of humour in the United States' in JM Davis & S Roach Anleu (eds) *Judges, Judging and Humour* (2018) at 286.

<sup>92</sup> Glasberg op cit note 87 at 381.

question is whether it is right that superiority humour is curtailed by the law of defamation. This section evaluates the precise test for defamatoriness employed in defamation cases concerning humour. It notes that (a) the oft-used classification of statements as defamatory because they ‘exposed the plaintiff to hatred, contempt or ridicule’<sup>93</sup> is more likely to be satisfied by instances of superiority humour, thereby rendering superiority jokes more susceptible to defamatory liability. It argues that (b) this legal position is unwarranted for the simple reason that there exists no necessary connection between the plaintiff’s exposure to ridicule and their probable reputational injury, which is the harm that the law of defamation proclaims to guard plaintiffs against. Instead, it appears that (c) courts are erroneously using the law of defamation to remedy the plaintiff’s distinct legal injury to their dignity by way of insult. The result is that superiority humour will attract liability for defamation even where no defamation, correctly understood, has occurred.

(a) *The ‘exposure to ridicule’ test*

It is trite that determining the defamatoriness of the defendant’s statement involves two stages. First, the meaning of the statement is interpreted, whereafter its probable impact on the plaintiff’s reputation is assessed.<sup>94</sup> At the second stage, the question to be asked is whether the defendant’s statement would probably lower the estimation of the plaintiff in the eyes of right-thinking members of society generally.<sup>95</sup> This is the threshold test for defamation that has been widely adopted in South African cases.<sup>96</sup> Although ‘right-thinking members’ and ‘society generally’ have been further qualified over the years, the precise meaning of the phrase ‘lowers the estimation of the plaintiff’ requires delineation.

Examples of statements that have been recognised as defamatory over time include those which have: (i) impugned the plaintiff’s moral character, for example through allegations pertaining to the plaintiff’s commission of a crime, cowardice, dishonesty, dishonourable conduct, drug addiction, incompetence, informing, sexual immorality or spying; (ii) impaired the plaintiff’s professional or business reputation, for example through allegations of bribery, cruel and inhumane business practices or lack of knowledge and skill; or (iii) exposed the plaintiff to hatred, contempt or ridicule, for example through allegations that the plaintiff was

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<sup>93</sup> *Parmiter* supra note 2 at 108.

<sup>94</sup> *Le Roux* supra note 1 para 89. See Chapter 2II(b) above.

<sup>95</sup> *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240.

<sup>96</sup> See FDJ Brand ‘Defamation’ in *LAWSA* 3 ed Volume 14 (2017) para 114 footnote 5 and the cases cited there.

a communist, a homosexual or a Nazi.<sup>97</sup> Owing to its prevalence in those defamation cases involving allegedly humorous publications, the third categorisation of defamatory statements commands the focus of this subsection.<sup>98</sup> Two initial observations can be made.

First is that the verb ‘employed’ has changed over time. Early writers recognise as defamatory those statements that brought the plaintiff into hatred, contempt or ridicule.<sup>99</sup> In his seminal work on defamation, Burchell classes such statements as those that aroused hatred, contempt or ridicule,<sup>100</sup> yet a few pages later, he classifies them as those that subjected the plaintiff to hatred, contempt or ridicule.<sup>101</sup> Nowadays, most writers describe such statements as those that exposed the plaintiff to hatred, contempt or ridicule.<sup>102</sup> The interchangeability of the action word used here does not pose an insurmountable problem to the threshold test for defamation. ‘Aroused’, ‘brought the plaintiff into’, ‘exposed’ and ‘subjected’ are all synonymous with the requirement that the defendant, through their publication, must have shone a light on some conduct or characteristic of the plaintiff that would probably injure the plaintiff’s reputation.<sup>103</sup>

The second observation is that the nouns used have also changed over time. In addition to ‘hatred’, ‘contempt’ and ‘ridicule’, synonyms mentioned in the textbooks include ‘contumely’,<sup>104</sup> ‘degradation’,<sup>105</sup> ‘disrespect’,<sup>106</sup> ‘disrepute’,<sup>107</sup> ‘enmity’,<sup>108</sup> ‘ignominy’,<sup>109</sup> and ‘*undue* ridicule’.<sup>110</sup> These words quite clearly dovetail with superiority humour. Superiority jokes are deemed funny precisely because they are aimed at the derision and disparagement of

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<sup>97</sup> This taxonomy is drawn from an amalgamation of the examples listed in De Villiers op cit note 66 at 93–6; M Nathan *The Law of Defamation (Libel & Slander) in South Africa* (1933) at 47–81; RG McKerron *The Law of Delict* 7 ed (1971) at 172; J Burchell *The Law of Defamation in South Africa* (1985) at 103–25; D Visser ‘Compensation for harm to the personality — the *actio iniuriarum*’ in F du Bois (ed) *Wille’s Principles of South African Law* 9 ed (2007) at 1171–3; JC Van der Walt & JR Midgley *Principles of Delict* 4 ed (2016) para 106; Brand ibid paras 114–15; M Loubser & R Midgley *The Law of Delict in South Africa* 3 ed (2017) at 424–7; J Neethling, JM Potgieter & A Roos *Neethling on Personality Rights* (2019) at 205–15.

<sup>98</sup> In addition to the majority in *Le Roux* supra note 1, Ndita J for the Western Cape High Court in *Pudney v Engler* [2016] JOL 37379 (WCC) para 33 also deemed the impugned article defamatory because ‘an ordinary reader would understand the statement as belittling the plaintiff, making him to look foolish and unworthy of respect, or as *exposing him to ridicule and contempt*.’ Emphasis added.

<sup>99</sup> De Villiers op cit note 66 at 128; Nathan op cit note 97 at 47; McKerron op cit note 97 at 172.

<sup>100</sup> Burchell op cit note 97 at 103.

<sup>101</sup> Ibid at 119.

<sup>102</sup> Van der Walt & Midgley op cit note 97 para 106; Brand op cit note 96 para 114; Loubser & Midgley op cit note 97 at 425.

<sup>103</sup> Neethling, Potgieter & Roos op cit note 97 at 205 footnote 62. See Chapter 2II(b) footnote 27 above.

<sup>104</sup> Nathan op cit note 97 at 64.

<sup>105</sup> Burchell op cit note 97 at 125.

<sup>106</sup> Neethling, Potgieter & Roos op cit note 97 at 206.

<sup>107</sup> De Villiers op cit note 66 at 128.

<sup>108</sup> Van der Walt & Midgley op cit note 97 para 106; Brand op cit note 96 para 114.

<sup>109</sup> Burchell op cit note 97 at 125.

<sup>110</sup> McKerron op cit note 97 at 172. Emphasis added.

the joke's object. If they achieve that purpose, then superiority jokes undoubtedly expose the plaintiff to ridicule and fall into the catchment area of the third category of defamatory statements. Hence the majority in *Le Roux* deemed the impugned image to be defamatory of Dr Dey because it (i) belittled, disrespected and humiliated him; (ii) made him look foolish, ridiculous and absurd; and (iii) exposed him to contempt, hurt and ridicule, which rendered him unworthy of the learners' respect.<sup>111</sup> However, as I will explain in the next subsection, it is doubtful whether the plaintiff's exposure to hatred, contempt or ridicule because of the defendant's publication ought to be sufficient to ground liability for defamation.<sup>112</sup>

(b) *The undue limitation of superiority humour*

Nathan says that where the plaintiff has suffered hatred or contempt as a result of the defendant's publication, in order to be defamatory the imputation made against them must still be 'of such a kind as tends to lower them in esteem'.<sup>113</sup> Similarly, Burchell contends that the plaintiff's exposure to hatred or contempt is merely a subsidiary occurrence to the successful application of the general test, which requires that the words must have probably lowered the plaintiff's standing in the estimation of others.<sup>114</sup> On the contrary, McKerron considers such statements to be defamatory *even where* they cast no aspersion upon the plaintiff's moral character.<sup>115</sup> This leads one to wonder what the position is concerning those statements that exposed the plaintiff to ridicule, as superiority humour certainly does. The discussion of the cases below demonstrates that the plaintiff's mere exposure to ridicule alone ought to be insufficient for the defendant's publication to be deemed defamatory.

In *Lewison v Philips*,<sup>116</sup> the respondent had published two pictures caricaturing the likeness of the appellant. The Supreme Magistrate upheld the Resident Magistrate's finding on the limited point that, even though the pictures had held the appellant up to ridicule, the ridicule he had suffered was 'not to a very great extent'<sup>117</sup> and it 'could have [had] no effect prejudicial to his character or reputation'.<sup>118</sup> It therefore seems that the mere presence of ridicule alone —

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<sup>111</sup> *Le Roux* supra note 1 paras 107, 109, 115 and 119.

<sup>112</sup> Other common law jurisdictions such as Australia (*Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449), the United Kingdom (*Berkoff v Burchill* [1996] 4 All ER 1008) and the United States of America (*Burton v Crowell* 82 F 2d 154 (1936)) have grappled with this question.

<sup>113</sup> Nathan op cit note 97 at 64.

<sup>114</sup> Burchell op cit note 97 at 114–15.

<sup>115</sup> McKerron op cit note 97 at 172.

<sup>116</sup> (1842) 3 Menz 37.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

ie without concomitant probable injury to the plaintiff's reputation — cannot render the publication defamatory. The plaintiff's exposure to ridicule may, however, constitute an injury to the plaintiff's feelings, which is actionable outside of the law of defamation by way of the action for insult.<sup>119</sup>

In *Kimpton v Rhodesian Newspapers Ltd*,<sup>120</sup> the respondent newspaper had published an article containing the statement that the appellant, an ex-serviceman of the British Empire Service League, was a 'nonentity trying to push himself into the limelight for his own personal ends.'<sup>121</sup> The author wrote the article after learning that Mr Kimpton had been recommended to the Governor-General as a fit and proper person capable of representing the League by accompanying the Prince of Wales on his projected visit to South Africa.<sup>122</sup> The author deemed the League's request — that Mr Kimpton, a retired member of the League who had never led troops in action, be chosen ahead of a senior serving officer — 'ridiculous'<sup>123</sup> and 'the height of absurdity.'<sup>124</sup>

Although the article may have caused some to poke fun at Mr Kimpton for thinking of himself as important enough to accompany the Prince of Wales, the Appellate Division deemed the statement itself non-defamatory.<sup>125</sup> Innes CJ opined that there was no doubt that the statement held Mr Kimpton up to some degree of ridicule, 'but in order to be defamatory, ridicule must have an element of *contumelia*. The mere raising of a laugh is not sufficient.'<sup>126</sup> So too in *De Wet v Morris*,<sup>127</sup> Lansdown J repeated that 'mere ridicule is not defamatory unless there is contained in the statement conveying the ridicule some element of *contumelia*.'<sup>128</sup> It thus appears that mere ridicule alone without something more, namely *contumelia*, is insufficient to ground defamatoriness.

#### (i) Contumelia

Much evidently turns on the precise meaning of the word '*contumelia*', for, at least in these early cases, it appears to be a necessary requirement for the plaintiff's ridicule to be elevated

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<sup>119</sup> Ibid at 38. More on that in subsection (c) below.

<sup>120</sup> 1924 AD 755.

<sup>121</sup> Ibid at 757.

<sup>122</sup> Ibid at 756.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid at 757.

<sup>126</sup> Ibid at 757–8.

<sup>127</sup> 1934 EDL 75.

<sup>128</sup> Ibid at 77.

to the plaintiff's defamation. However, the discussion of the sources below demonstrates both that a conclusive definition of *contumelia* remains elusive, and that the concept itself fails to adequately explain how the plaintiff's exposure to ridicule amounts to their probable reputational injury.<sup>129</sup>

De Villiers identifies two uses of the word '*contumelia*'. The first pertains to the arrogant intent of the defendant, whereas the second refers to the plaintiff's ignominy — ie the public shame and disgrace — ensuing from the defendant's conduct.<sup>130</sup> Peter Birks endorses this dual meaning of *contumelia* as connoting 'both the attitude of mind and the conduct emanating from it',<sup>131</sup> as does Scott, who states that *contumelia* refers 'not only to a particular attitude of mind but also to the conduct flowing from it'.<sup>132</sup>

As to the first meaning, Birks translates *contumelia* into English as 'contempt',<sup>133</sup> but David Ibbetson prefers the translation of *contumelia* as 'disrespect'.<sup>134</sup> *Contumelia* in this first sense arguably connotes the defendant's injurious intention, which — although an essential ingredient for the delict of defamation — is of little import under the defamatoriness enquiry.<sup>135</sup> Rather, the presumption of the defendant's *animus iniuriandi* is the stage of the action for defamation where the defendant's injurious intention and any available defences aimed at rebutting that presumption are considered.<sup>136</sup>

Instead, Burchell argues that several cases recognise *contumelia* in its second sense as being a necessary condition for the impairment of the plaintiff's reputation or dignity.<sup>137</sup> However, of the three cases cited in support of his claim, two pertain to the impairment of dignity rather than reputation.<sup>138</sup> That leaves *Kimpton* as the sole authority for the proposition that *contumelia* must be present for ridicule to be actionable as defamation.<sup>139</sup> As to its second meaning, Burchell translates *contumelia* to mean that the plaintiff 'must have been exposed to ignominy, degradation or insult.'<sup>140</sup> He goes on to say:

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<sup>129</sup> See A Fagan '*Iniuria* and respect in Roman and South African law' in N Jansen & S Meier (eds) *Iurium itinera: Historical Comparative Law and Comparative Legal History* (2022) at 729–33 for a recent summary of the role that *contumelia* plays in *iniuria* more generally.

<sup>130</sup> De Villiers op cit note 66 at 255 footnote 4.

<sup>131</sup> P Birks 'Harassment and hubris: The right to an equality of respect' (1997) 32 *Irish Jurist* 1 at 8.

<sup>132</sup> H Scott '*Contumelia* and the South African law of defamation' in E Descheemaeker & H Scott (eds) *Iniuria and the Common Law* (2013) at 126.

<sup>133</sup> Birks op cit note 131 at 8–9.

<sup>134</sup> D Ibbetson '*Iniuria*, Roman and English' in E Descheemaeker & H Scott (eds) *Iniuria and the Common Law* (2013) at 40.

<sup>135</sup> Neethling, Potgieter & Roos op cit note 97 at 66–7.

<sup>136</sup> See Chapter 2II(e) above.

<sup>137</sup> J Burchell 'The criteria of defamation' (1974) 91 *SALJ* 178 at 201–2.

<sup>138</sup> *Walker v Van Wezel* 1940 WLD 66 at 70; *Mhlongo v Bailey* 1958 (1) SA 370 (W) at 371–2.

<sup>139</sup> *Kimpton* supra note 120 at 757–8.

<sup>140</sup> Burchell op cit note 137 at 201.

Where the injury to the plaintiff's moral character or exposure to hatred, contempt or ridicule has resulted, *contumelia* in this sense will almost always be present. Where it is lacking, the plaintiff will not have been lowered in estimation and no defamation will have occurred.<sup>141</sup>

The question, however, remains whether *contumelia* in its second sense does the work of explaining how exactly the plaintiff's exposure to ridicule renders the defendant's publication defamatory. Put differently, it remains unclear how the creation of a distressful condition within the plaintiff, which itself is actionable outside of the law of defamation through the action for insult, is necessarily connected to the plaintiff's probable reputational injury.<sup>142</sup>

(ii) No necessary connection between ridicule and reputational injury

One answer may be that it is simply a matter of degree. *Lewison* and *Kimpton* seem to suggest that where the plaintiff has been exposed to only a slight degree of ridicule, such will not amount to probable reputational injury. But if it is truly just a matter of degree, then the question remains: *how much* ridicule gives rise to the plaintiff's probable reputational injury? Burchell seems alive to the difficulty implicit in asking such a quantitative question. Regarding cartoons and caricatures, he says that '[i]f the humour or ridicule is understood as good-natured fun, not to be taken seriously, then it is not defamatory',<sup>143</sup> but he also notes that '[t]here is sometimes a fine line between ridicule, which would constitute defamatory matter, and good-natured fun, which would not.'<sup>144</sup>

In the context of Australian defamation law, Roger Magnusson suggests that there must be 'more than a trivial degree'<sup>145</sup> of ridicule for the defendant's publication to be deemed defamatory. Only ridicule that is 'overwhelming'<sup>146</sup> or 'enduring'<sup>147</sup> would pass the threshold. However, Lawrence McNamara points out that Magnusson's suggestion still fails to explain how the plaintiff's exposure to ridicule, albeit overwhelming or enduring, tarnishes their reputation.<sup>148</sup> Instead, McNamara contends that the harshness of the plaintiff's mockery is in no way connected to their probable reputational injury because the two are separate injuries that do not lie on the same continuum.<sup>149</sup> For this reason, Neethling, Potgieter and Roos'

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<sup>141</sup> Ibid at 202.

<sup>142</sup> Little op cit note 4 at 141.

<sup>143</sup> Burchell op cit note 97 at 115.

<sup>144</sup> J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) at 196.

<sup>145</sup> R Magnusson 'Freedom of speech in Australian defamation law: Ridicule, satire and other challenges' (2001) 9 *Torts Law Journal* 269 at 281.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> L McNamara *Reputation and Defamation* (2007) at 184.

<sup>149</sup> Ibid at 176–8.

pronouncement that ‘the ridicule must be so serious (contemptuous) that it has the tendency to lower the esteem in which the plaintiff is held by the community’<sup>150</sup> suffers the same confusion.

Although they have been frequently recognised as being defamatory by South African courts, statements which merely result in the plaintiff being ‘shunned and avoided’ have come to be treated with appropriate caution for the simple reason that the mere loss of association occasioned by such statements cannot, without more, serve as conclusive proof of defamation.<sup>151</sup> For example, although one might shun and avoid a person with COVID-19, it is not defamatory per se to be identified as carrying the virus. Instead, any loss of association can only serve as a secondary indicator of the plaintiff’s probable reputational injury — for example, if it implies that the plaintiff is a selfish anti-vaxxer.<sup>152</sup>

By way of analogy, the same must be said of those statements which simply expose the plaintiff to ridicule. There is no clear point at which the degree of the plaintiff’s ridicule becomes so great that it diminishes the plaintiff’s estimation in the eyes of others. Instead, much like the plaintiff’s exposure to hatred and contempt cannot, without more, serve as conclusive proof of defamation, it is submitted that the plaintiff’s exposure to ridicule can only serve as prima facie evidence of the plaintiff’s loss of esteem within the community.<sup>153</sup>

One must not lose sight of the fact that the all-important threshold question in defamation law remains whether the plaintiff has suffered probable reputational injury because of the defendant’s publication.<sup>154</sup> To allow judges to equate ridicule with defamation on the basis of an unarticulated and inconsistent rationale, without first establishing an exact basis for the plaintiff’s loss of esteem within the community, would open the door to an unduly flexible application of the test for defamatoriness.<sup>155</sup> The publication itself must still have imputed some conduct or characteristic to the plaintiff that invited moral opprobrium and thereby caused the reasonable observer to think less of them — and it must be this defamatory imputation, as indicated but not determined by the plaintiff’s concomitant exposure to ridicule, which renders the defendant’s statement liable for defamation.<sup>156</sup>

This criticism of the exposure to ridicule test links to another criticism of the majority judgment in *Le Roux* levelled by Anton Fagan, who argues that the majority erroneously deemed the plaintiff’s mere association with, as opposed to a factual assertion of, defamatory

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<sup>150</sup> Neethling, Potgieter & Roos op cit note 97 at 206 footnote 69.

<sup>151</sup> Burchell op cit note 97 at 119–20.

<sup>152</sup> Compare *SA Associated Newspapers Ltd v Schoeman* 1962 (2) SA 613 (A) at 616–17.

<sup>153</sup> Burchell op cit note 97 at 114–15.

<sup>154</sup> See Chapter 2II(b) above.

<sup>155</sup> McNamara op cit note 148 at 164.

<sup>156</sup> Ibid at 108–110.

conduct as being defamatory.<sup>157</sup> It ought to be obvious that the plaintiff's mere association with either defamatory conduct or a defamatory characteristic will often see them being exposed to ridicule, and thereby satisfy this flawed test for defamatoriness. For example, merely associating the plaintiff with Hitler by way of doodling Hitler's moustache over the plaintiff's lips will expose the plaintiff to ridicule, even if the reasonable observer does not take the defendant's publication to be actually asserting that the plaintiff is Hitleresque.<sup>158</sup> As such, the exposure to ridicule test is primed to be satisfied by the plaintiff's mere association with belittling material, which forms the very cornerstone of superiority humour.

In light of the ridicule test's shortcomings, a solution must be found to avoid instances of what Fagan terms 'misfiring',<sup>159</sup> where 'the outcomes produced by the rules constituting the law of defamation are at odds with the deeper-lying rationale for those rules.'<sup>160</sup> One can either change the rules to better suit the gist of defamation as being concerned with reputation, or one can reconceptualise the underlying justification for defamation law to better explain the rules.<sup>161</sup> This subsection submits that the use of the plaintiff's exposure to ridicule to ground defamatory liability, without a finding of the plaintiff's probable reputational injury, betrays the basis of defamation law as being concerned with reputation. If this basis is accepted, then the ridicule test ought to be abandoned because it unduly renders superiority humour more susceptible to liability for defamation.

(c) *The conflation of the action for insult with the action for defamation*

Little observes that the use of the exposure to ridicule test in Australia has resulted in superiority jokes attracting liability for defamation 'without apparent regard for whether the humor suggests anything factually unflattering about the plaintiff.'<sup>162</sup> Instead, she notes that '[a] central impulse behind these ridicule cases seems to reflect a desire to remedy damage to the plaintiff's dignity.'<sup>163</sup> This subsection argues that the same could also be said of the

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<sup>157</sup> A Fagan 'The Constitutional Court loses its (and our) sense of humour: *Le Roux v Dey*' (2011) 128 SALJ 395.

<sup>158</sup> *Ibid* at 407.

<sup>159</sup> A Fagan 'Defamation, reputation and respect' in PJ Schwikkard & SV Hoor (eds) *A Reasonable Man: Essays in Honour of Jonathan Burchell* (2019) at 50.

<sup>160</sup> *Ibid*.

<sup>161</sup> F Jurgens *Risk as Injury: An alternative interpretation of the South African law of defamation* (unpublished PhD thesis, University of Cape Town, 2019) at 40 and 74.

<sup>162</sup> Little *op cit* note 4 at 148.

<sup>163</sup> *Ibid* at 150.

majority's finding of defamatoriness in *Le Roux*. It does so by unpacking the majority's flawed treatment of the difference between the action for defamation and the action for insult.

(i) The action for insult

Insult is but one type of *iniuria*,<sup>164</sup> which involves the defendant's wrongful and intentional infringement of the plaintiff's common-law personality right to dignity (*dignitas*).<sup>165</sup> The requirements for insult follow. First, the plaintiff must have suffered both a subjective and an objective violation of their sense of self-esteem, respect or worth.<sup>166</sup> From a subjective standpoint, the plaintiff must actually feel that they have been belittled, degraded, humiliated, hurt, offended or wounded by the defendant's conduct, which is not limited to words.<sup>167</sup> From an objective standpoint, the defendant's conduct must also be considered insulting by the reasonable person in the same position as, or of similar standing to, the plaintiff.<sup>168</sup> Secondly, once the plaintiff has established their subjective and objective insult, the defendant's conduct is presumed wrongful.<sup>169</sup> The presumption of wrongfulness can be rebutted using the traditional grounds of justification available in the law of delict more generally,<sup>170</sup> the law of defamation specifically,<sup>171</sup> as well as a separate ground of justification known as legitimate criticism.<sup>172</sup> Finally, in addition to the presumption of wrongfulness, the defendant's injurious intention (*animus iniuriandi*) is also rebuttably presumed.<sup>173</sup>

Owing to their similarities, the action for insult and the action for defamation are often conflated. However, the two actions differ in two important respects. First, the former is generally considered both to protect against and to compensate for damage to the plaintiff's personality right to dignity (*dignitas*), whereas the latter is typically considered to do the same

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<sup>164</sup> *R v Umfaan* 1908 TS 62 at 66.

<sup>165</sup> *Jackson v NICRO* 1976 (3) SA 1 (A) at 4.

<sup>166</sup> *Delange v Costa* 1989 (2) SA 857 (A) at 861–2.

<sup>167</sup> *Boswell v Union Club of South Africa (Durban)* 1985 (2) SA 162 (D).

<sup>168</sup> J Burchell 'Balancing "equality of respect" with freedom of expression' 2019 *Acta Juridica* 203 at 219 calls this the 'objective/reasonable restriction on the subjective assessment of what is offensive.'

<sup>169</sup> *Delange* supra note 166 at 861–2.

<sup>170</sup> Namely consent, necessity and private defence.

<sup>171</sup> Namely truth for the public benefit, fair comment, privileged occasion and reasonable publication.

<sup>172</sup> *Delange* supra note 166 at 861–2. Whether criticism is legitimate turns on the relationship of the parties involved and the nature of the affairs in which they are engaged. For example, businesspeople and politicians voluntarily enter the public domain and expose themselves to a higher degree of criticism. This means that such public figures may be expected to endure a greater degree of criticism than private individuals.

<sup>173</sup> *Ibid.*

for their personality right to reputation (*fama*).<sup>174</sup> Two different personality interests are involved and so the enquiries into their respective infringements are different.<sup>175</sup> Secondly, the insulting statement need not be published to a third party. Publication to the plaintiff alone is sufficient to ground the action for insult.<sup>176</sup> On the contrary, publication to a third party is a necessary element of the delict of defamation.<sup>177</sup>

As such, in accordance with the orthodox understanding of defamation law as being concerned with reputation, it is not only the element of publication to a third party that distinguishes the two actions but also the different personality interests at stake.<sup>178</sup> Conversely, if one adopts the alternative view that defamation is not so much concerned with the wrong of inflicting reputational harm, but is rather an instance of insult that has been aggravated by publication, then publication alone is the distinguishing feature of the delict.<sup>179</sup>

Given that the actions for insult and defamation differ with respect to the personality interest at play and the role of publication in each, conflation of the two actions should be avoided ‘for the purposes of conceptual clarity and consequently correct legal development.’<sup>180</sup> For this reason, Neethling, Potgieter and Roos contend that ‘[i]nsult or infringement of dignity has no role to play in questions relating to, for example, defamation’.<sup>181</sup> However, they also acknowledge that ‘[t]his does not mean that one and the same act is not capable of infringing both dignity and other personality interests. In fact, this will often be the case.’<sup>182</sup>

Concerning the infringement of reputation by defamation specifically, the same conduct can indeed both insult and defame the plaintiff.<sup>183</sup> To be perfectly clear, it is not the case that

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<sup>174</sup> Although, E Descheemaeker ‘Three keys to defamation: *Media 24* in a comparative perspective’ (2013) 130 *SALJ* 435 at 437 contends that ‘the question whether the action [for defamation] means to compensate — or in some other way assuage — wounded feelings, or some other interest(s) independent of feelings, or both, has never been satisfactorily clarified.’

<sup>175</sup> Van der Walt & Midgley op cit note 97 para 101.

<sup>176</sup> Despite not being a requirement for liability, publication of the insulting words to a third party does not preclude the words from being actionable. In fact, it occurs very often. The extent to which the plaintiff’s feelings are hurt is dependent on the extent of the publicity of the insult, so publication of the insulting words to third parties may serve to aggravate the damages award. See *Innes v Visser* 1936 WLD 44 at 45.

<sup>177</sup> Neethling, Potgieter & Roos op cit note 97 at 272 footnote 16.

<sup>178</sup> McNamara op cit note 148 at 171 notes that although the plaintiff’s self-worth undoubtedly may be affected by their reputational injury, this injury is merely tangential and does not render self-worth the proper purview of defamation law. E Descheemaeker ‘Protecting reputation: defamation and negligence’ (2009) 29 *Oxford Journal of Legal Studies* 603 at 616 identifies wealth, mental well-being and physical integrity as also being ‘parasitic’ interests that the law of defamation only concerns itself with once an injury to the plaintiff’s primary interest of reputation has occurred.

<sup>179</sup> FG Gardiner ‘Is publication essential to an action for defamation?’ (1897) 14 *Cape Law Journal* 184; RG McKerron ‘Fact and fiction in the law of defamation’ (1931) 48 *SALJ* 154 at 172.

<sup>180</sup> Neethling, Potgieter & Roos op cit note 97 at 42.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> Visser op cit note 97 at 1166.

insulting words will always amount to defamation upon their publication to third parties,<sup>184</sup> nor that defamatory words will always be insulting of the plaintiff.<sup>185</sup> However, there is significant overlap between the two, which means that defamatory statements are often themselves insulting.<sup>186</sup> Despite the desirability of keeping the two actions as conceptually distinct as possible, the reality is that the same conduct, being the defendant's publication, may theoretically give rise to two separate causes of action: one for insult and another for defamation. This leads to the question whether both actions may be successfully claimed concurrently. According to *Amler's Precedents of Pleadings*, the answer is a resounding 'No'.<sup>187</sup>

There are substantive and pragmatic reasons for the indivisibility of the *actio iniuriarum*, which are somewhat explained by Harms DP and Brand AJ in their respective majority judgments for the Supreme Court of Appeal and the Constitutional Court in *Le Roux*.<sup>188</sup> However, this subsection argues that the discussion of the two actions, namely insult and defamation, in the respective judgments arguably reveals something far deeper and more conceptually problematic: that it was the injury to Dr Dey's dignity by way of insult, and not the probable injury to his reputation by way of defamation, which both judges erroneously sought to remedy by granting Dr Dey his action for defamation.

#### (ii) The use of the law of defamation to remedy the plaintiff's insult

The High Court found both that Dr Dey's dignity had been infringed by the publication, thereby grounding his action for insult, and that his reputation had probably been injured, thereby grounding his action for defamation. Despite Dr Dey's success on both fronts, the High Court did not award him damages in respect of his claim for insult. Instead, it awarded him a single lump sum of R45 000 in respect of his defamation claim, such amount having taken his hurt feelings into account.<sup>189</sup>

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<sup>184</sup> There are countless examples of words which may be insulting but not defamatory. For example, it is not defamatory to be classed as being a woman or Jewish but calling someone a 'bloody bitch' or a 'bloody Jew boy' may be insulting. See *Brenner v Botha* 1956 (3) SA 257 (T); *Tarloff v Olivier* [2004] 1 All SA 563 (C).

<sup>185</sup> An example is where a narcissist is publicly labelled as such. Although the narcissist might succeed in his action for defamation, if he is indeed a narcissist who views himself as beyond reproach, then he does not suffer the subjective injury to his dignity that is necessary to ground an action for insult.

<sup>186</sup> *Le Roux* supra note 1 para 141.

<sup>187</sup> LTC Harms *Amler's Precedents of Pleadings* 9 ed (2018) at 207.

<sup>188</sup> See C Gower & CJ Visser 'Actio iniuriarum – one action, but only one *iniuria*? *Le Roux v Dey* 2011 3 SA 274 (CC)' (2013) 76 *THRHR* 490.

<sup>189</sup> *Le Roux* supra note 67 para 1.

In the Supreme Court of Appeal, Dr Dey argued that a separate damages award should have been made in respect of his successful action for insult.<sup>190</sup> However, Harms DP overturned the High Court's finding that Dr Dey had suffered an insult on the ground that, where damages are claimed with the *actio iniuriarum* for insult as well as defamation, granting the success of both actions where each arose from the same conduct would amount to an impermissible accumulation of actions.<sup>191</sup> According to Harms DP, such a 'splitting of causes of action'<sup>192</sup> would be ill-founded because a court will also take the plaintiff's humiliation into account when assessing damages for defamation.<sup>193</sup> As such, Harms DP upheld the High Court's finding of defamatoriness and left the damages award of R45 000 unaltered.<sup>194</sup>

On the face of it, Harms DP's decision — to dismiss Dr Dey's action for insult and instead remedy his hurt feelings by taking them into account when quantifying the damages awarded for defamation — fits the existing legal mould. An infringement of reputation is often accompanied by an affront to dignity, so why not just recompense the plaintiff's insult by way of the damages awarded for the defamation? However, this subsection submits that Harms DP's reasoning reveals something more controversial in substance, namely support for the alternative view of defamation as being primarily an affront to the plaintiff's dignity that is then aggravated by publication.<sup>195</sup> The key passage from his judgment is quoted in full:

I am unaware of any instance in the history of the *actio iniuriarum* where a particular defamatory act gave rise to two causes of action. (I exclude the cases where patrimonial damages are also claimed.) The reason is in my view that any *defamation is in the first instance an affront to a person's dignity which is aggravated by publication*. Someone who is not affronted by a publication and who does not feel *humiliated* will not sue for defamation.<sup>196</sup>

Harms DP's view of the action for defamation as essentially being an injury to the plaintiff's dignity, with publication to third parties being only an aggravating factor and not an essential feature of the wrong, more closely aligns with the Roman understanding of the delict and less with the reputation-oriented English tort that has found orthodoxy in South African law.<sup>197</sup> This leads one to question whether Harms DP deemed the image defamatory of Dr Dey because it was insulting, irrespective of whether it had any probable effect on his reputation.<sup>198</sup> Given that

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<sup>190</sup> Ibid para 21.

<sup>191</sup> Ibid para 22.

<sup>192</sup> Ibid para 4.

<sup>193</sup> Ibid para 23.

<sup>194</sup> Ibid para 48.

<sup>195</sup> See footnote 179 above.

<sup>196</sup> *Le Roux* supra note 67 para 23. Emphasis added.

<sup>197</sup> *Die Spoorbond v SA Railways, Van Heerden v SA Railways* 1946 AD 999 at 1010.

<sup>198</sup> Jurgens op cit note 161 at 16–17.

subsection (b) above identified the problem of the lack of a necessary link between the plaintiff's exposure to ridicule and their probable reputational injury, there is reason to doubt that the impugned image had any prejudicial effect on Dr Dey's reputation.

In the Constitutional Court, it was common cause that Dr Dey's dignity claim only fell to be decided if his defamation claim failed.<sup>199</sup> Brand AJ reaffirmed the reasoning of Harms DP for the Supreme Court of Appeal in the main. He agreed that a defendant cannot be held liable for more than one *actio iniuriarum* arising from the same conduct.<sup>200</sup> His reasoning for this being that the personality interests of *corpus*, *dignitas* and *fama* often overlap, so 'an award of damages for defamation should compensate the plaintiff for both wounded feelings and the loss of reputation.'<sup>201</sup> Considering that the majority did indeed deem the image defamatory of Dr Dey, the corollary of his success in his defamation claim was that his claim based on dignity had to fail.<sup>202</sup>

Had Brand AJ left matters there, his decision to dismiss Dr Dey's action for insult on account of Dr Dey's successful action for defamation would also, like Harms DP's decision, have been perfectly palatable as fitting within the established mould. However, Brand AJ did not leave matters there. Instead, he went on to make two contradictory statements. On the one hand, Brand AJ stated that if Dr Dey's defamation claim had failed, his dignity claim would have succeeded.<sup>203</sup> Yet, on the other hand, Brand AJ stated the exact opposite, namely that if Dr Dey's defamation claim had failed, his dignity claim would also have failed as well.<sup>204</sup>

The essence of Brand AJ's two conflicting views boils down to his interpretation of the role that objectivity plays in determining whether a statement is insulting or defamatory. Both actions involve an objective assessment of the wrongfulness of the defendant's conduct. Brand AJ questioned how it could ever be the case that the reasonable observer would reach opposing views as to the wrongfulness of the same conduct. Surely if a statement is deemed defamatory 'because in the eyes of the reasonable observer it was likely to make Dr Dey look foolish and ridiculous',<sup>205</sup> then it will simultaneously be deemed insulting because the reasonable observer would agree that the plaintiff was right to 'have felt humiliated and belittled'?<sup>206</sup>

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<sup>199</sup> *Le Roux* supra note 1 para 26.

<sup>200</sup> *Ibid* para 140.

<sup>201</sup> *Ibid* para 142.

<sup>202</sup> *Ibid*.

<sup>203</sup> *Ibid* para 143.

<sup>204</sup> *Ibid* para 146.

<sup>205</sup> *Ibid* para 145.

<sup>206</sup> *Ibid*.

However, therein lies the rub. As Neethling and Potgieter point out, Brand AJ's confusion stems from his understanding of defamation as being concerned with the publication of a humiliating statement to a third party.<sup>207</sup> That is not in fact what defamation is concerned with, at least according to the orthodox approach. The plaintiff's humiliation does, however, fit perfectly within the remit of the action for insult — hence Brand AJ's unpersuasive insistence on the symbiotic relationship between the two actions.<sup>208</sup> If one accepts the orthodox approach, that defamation protects a legal interest in reputation as related to but conceptually distinct from the personality right to dignity, then it indeed ought to be possible for the reasonable observer to grant that a publication insulted the plaintiff without at the same time granting that it defamed them.<sup>209</sup>

That is precisely what the minority of the Constitutional Court did in *Le Roux*. According to Froneman and Cameron JJ, Dr Dey may well have been hurt and insulted by the image, and reasonable bystanders may well have been offended or shocked by it, but that alone did not necessitate an injury to his reputation and ground liability for defamation.<sup>210</sup> Instead, they pointed out that there *is* a difference between feeling hurt yourself and thinking less of someone else.<sup>211</sup> The former concerns one's inward-looking self-esteem, whereas the latter concerns one's outward-looking public esteem. It is therefore possible that the same publication can indeed fail to injure the plaintiff's reputation but succeed in injuring the plaintiff's feelings.<sup>212</sup> In accordance with the requirements for insult listed above, Froneman and Cameron JJ found that the image had subjectively and objectively wounded Dr Dey in his feelings.<sup>213</sup>

So, like Harms DP for the Supreme Court of Appeal, Brand AJ's discussion of the two actions arguably betrays something far deeper: that his finding of defamatoriness was premised not on the basis that probable injury to Dr Dey's reputation had occurred, but on the basis that the image in question had insulted Dr Dey, thereby constituting an infringement of his dignity which was only aggravated by publication. As such, the reasoning of the majority in *Le Roux* suggests that, much like Australian defamation cases involving humour, the ridicule test has been 'pressed into service in order to compensate plaintiffs who have suffered no

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<sup>207</sup> J Neethling & JM Potgieter 'Defamation of school teachers by learners: *Le Roux v Dey* 2011 3 SA 274 (CC)' 2011 *Obiter* 721 at 727–8.

<sup>208</sup> *Ibid.*

<sup>209</sup> Van der Walt & Midgley op cit note 97 para 101.

<sup>210</sup> *Le Roux* supra note 1 para 154.

<sup>211</sup> *Ibid* para 179.

<sup>212</sup> *Ibid.* Loubser & Midgley op cit note 97 at 430 agree with Froneman and Cameron JJ on this point, praising their 'clear exposition of the nuanced relationship between reputation and dignity within the constitutional rubric.'

<sup>213</sup> *Ibid* paras 176 and 190.

disparagement and hence no injury to their reputations.<sup>214</sup> Instead, it appears as though the ridicule test has become ‘a vehicle for remedy to harm to the plaintiff’s self-image or sense of self-worth, as distinct from the plaintiff’s standing in the eyes of others.’<sup>215</sup> The undesirable result is that superiority humour will attract liability for defamation even where the plaintiff has not been defamed.

## V CONCLUSION

The purpose of this chapter was to consider the fate of humour under the defamatoriness enquiry. Section II introduced three predominant theories of humour that seek to explain why a communication is considered funny, namely the superiority, release and incongruity theories. It demonstrated that whilst an element of incongruity is a necessary condition for humour, the three theories are not mutually exclusive and the humorous nature of an impugned communication can often be explained in terms of all three theories simultaneously, albeit to varying degrees. It also cautioned that even distasteful humour can be funny.

Section III investigated the extent to which the three theories of humour featured in the multiple judgments of the Constitutional Court in *Le Roux*. It demonstrated that whereas the minority attributed the humour behind the impugned image to the incongruity theory, the majority attributed the communication’s funniness to the superiority theory. This aligns *Le Roux* with the trend identified in other common law jurisdictions, namely that superiority humour is more likely to attract liability for defamation.

Section IV explained that the apparent correlation between superiority humour and liability for defamation stems from the significant overlap between superiority jokes, which are belittling and degrading, and the categorisation of statements as defamatory because they exposed the plaintiff to ridicule. It problematised this test for defamatoriness because there exists no necessary connection between the plaintiff’s exposure to ridicule and their probable reputational injury, which is the harm that the law of defamation purportedly guards plaintiffs against. The result is that the test for defamatoriness is more likely to be satisfied, and unduly so, by instances of superiority humour. It further criticised the majority’s finding of defamatoriness in *Le Roux* on the ground that the majority erroneously conflated the action for defamation with the action for insult, which led it to remedy the injury to Dr Dey’s dignity by

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<sup>214</sup> S Walker *Media Law: Commentary and Materials* (2000) at 137.

<sup>215</sup> Magnusson op cit note 145 at 280–1.

way of liability for defamation notwithstanding that Dr Dey had suffered no probable reputational injury.

Having concluded the assessment of humour's influence under the defamatoriness enquiry, Chapter 5 below evaluates the viability of jest as a defence capable of rebutting either the presumption of the defendant's intention or the presumption of wrongfulness.

## I INTRODUCTION

The previous chapter evaluated the fate of humour under the defamatoriness enquiry. Where humour fails to negate the defamatoriness of the defendant's publication concerning the plaintiff, two rebuttable presumptions arise.<sup>1</sup> The first is the presumption that the defendant's conduct was wrongful; the second is the presumption that the defendant acted with injurious intent.<sup>2</sup> The onus then falls on the defendant to provide 'some lawful justification or excuse'<sup>3</sup> for their defamatory statement, which they can do either by raising one of the recognised defences or by establishing a new defence.<sup>4</sup> This chapter evaluates the viability of jest as a defence capable of rebutting either presumption.

The defences available to the defendant in an action for defamation are typically divided into two categories. Those classed as rebutting the presumption of wrongfulness are often termed 'justifications', the successful invocation of which excludes the unlawfulness of the defendant's conduct. Those classed as rebutting the presumption of intention are often labelled 'excuses', the successful invocation of which excludes the defendant's blameworthiness.<sup>5</sup> Although there are important conceptual differences between justifications and excuses,<sup>6</sup> this chapter does not challenge the orthodox classification of the established defences to an action for defamation as being either justifications or excuses, nor consequently whether they should be properly understood as rebutting either the presumption of wrongfulness or the presumption of intention,<sup>7</sup> or both.<sup>8</sup> It accepts the orthodox classification of all the defences barring the defence of jest, the true ideological home of which commands the focus of this chapter.

<sup>1</sup> *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 18.

<sup>2</sup> *Modiri v Minister of Safety and Security* 2011 (6) SA 370 (SCA) para 12.

<sup>3</sup> *Nasionale Pers Bpkt v Long* 1930 AD 87 at 99.

<sup>4</sup> *Le Roux v Dey* 2011 (3) SA 274 (CC) para 123.

<sup>5</sup> J Burchell *The Law of Defamation in South Africa* (1985) at 34.

<sup>6</sup> See K Greenawalt 'The perplexing borders of justification and excuse' (1984) 84 *Columbia Law Review* 1897; J Gardner 'Justifications and reasons' in AP Simester & ATH Smith (eds) *Harm and Culpability* (1996). Both Gardner and Greenawalt write about justifications and excuses in the context of the criminal law. However, their arguments and observations can plausibly be extrapolated to the law of delict, whose defences are analogous to those that exist in the criminal law.

<sup>7</sup> For a sharp rebuke of the move by certain South African academics and judges in the 1960s to categorise the traditional defences of truth for the public benefit, privileged occasion and fair comment as rebutting the presumption of wrongfulness and not the presumption of *animus iniuriandi*, see A Fagan 'The gist of defamation in South African law' in E Descheemaeker & H Scott (eds) *Iniuria and the Common Law* (2013).

<sup>8</sup> See E Descheemaeker "'A man of bad character has not so much to lose": Truth as a defence in the South African law of defamation' (2011) 128 *SALJ* 452 at 458–9 concerning the defence of truth for the public benefit, as well as Burchell op cit note 5 at 271–3 and JC Van der Walt & JR Midgley *Principles of Delict* 4 ed (2016) para 143 concerning the defence of provocation (*rixa*).

Assuming that consciousness of wrongfulness is a key component of *animus iniuriandi*, it can never be the case that a statement lacking wrongfulness is deemed to have been uttered with consciousness of wrongfulness.<sup>9</sup> Therefore, ‘wrongful conduct on the part of the defendant is logically and indispensably a prerequisite for the existence of fault.’<sup>10</sup> As such, the presumption of wrongfulness and all of the defences available to the defendant rebutting this presumption typically fall to be addressed *before* the presumption of intention and all of the defences available to the defendant rebutting that presumption.<sup>11</sup> Notwithstanding the correct order in which the presumptions usually ought to be addressed, this chapter evaluates the viability of jest as a defence rebutting the presumption of the defendant’s intention first for the simple reason that it is typically listed as doing so in most textbooks on the matter.<sup>12</sup>

Section II argues that jest is ill-suited as a defence rebutting the presumption of intention for three interrelated reasons. They are (a) the subtle but important distinction between motive to raise a laugh and legal intention to injure, (b) the evidential difficulty implicit in disproving the presumption of intention, and (c) the inevitable overlap between the risky enterprise of joke-telling and the wide-reaching nature of the standard of intention that is *dolus eventualis*. Thereafter, section III evaluates whether jest might better serve as a defence rebutting the presumption of wrongfulness. It begins by (a) assessing the extent to which defamatory humour is already protected by the traditional defences aimed at rebutting the presumption of wrongfulness. After delineating the precise limits of the existing defences and identifying the exact instance of defamatory humour that will not be covered by any of them, it (b) argues that there is increased scope for the protection of defamatory humour under the defence of qualified privilege in particular, which may be developed to recognise certain comedic occasions as being privileged. Section IV concludes the chapter.

## II JEST AS A DEFENCE REBUTTING INTENTION

Neethling, Potgieter and Roos contend that if the defendant can prove that they did not direct their will at injuring the plaintiff’s reputation, then theoretically they should be able to escape liability for defamation by way of successfully rebutting the presumption of *animus*

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<sup>9</sup> J Neethling, JM Potgieter & A Roos *Neethling on Personality Rights* (2019) at 87.

<sup>10</sup> Van der Walt & Midgley op cit note 8 para 135.

<sup>11</sup> M de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) at 105.

<sup>12</sup> Burchell op cit note 5 at 285–6; Van der Walt & Midgley op cit note 8 para 142; Neethling, Potgieter & Roos op cit note 9 at 243.

*iniuriandi*.<sup>13</sup> However, because courts — such as the Transvaal Provincial Division in *Masch*<sup>14</sup> — have not followed this approach, instead holding that the reasonable bystander must also have regarded the publication as a joke, the defendant seemingly can be held liable ‘irrespective of the actual absence or presence of *animus iniuriandi*.’<sup>15</sup> According to the authors, this approach is wrong. If jest is to serve as a defence capable of rebutting the presumption of *animus iniuriandi*, then its success must stand or fall by that element of the defamation enquiry alone — ie without also requiring the defendant to prove that the reasonable observer did not deem the statement defamatory.<sup>16</sup>

Although correct in their assessment of the coupled approach to jest adopted in *Masch*, Neethling et al’s lament is arguably outdated considering that the Constitutional Court in *Le Roux*<sup>17</sup> entertained, albeit only implicitly, the possibility that jest could indeed rebut the presumption of *animus iniuriandi* alone, at least in theory.<sup>18</sup> To succeed with the defence of jest, the defendant would have to prove that they lacked the intention to defame because they subjectively believed that they were joking,<sup>19</sup> which they could do by adducing evidence demonstrating either that they did not direct their will at defaming the plaintiff or that they lacked consciousness of wrongfulness.<sup>20</sup>

Notwithstanding the theoretical possibility that jest *could* serve to rebut the presumption of intention, the defence has failed in all three of the South African cases in which it has been raised thus far.<sup>21</sup> This section argues that there are three interrelated explanations for its repeated failure that render jest ill-suited as a defence aimed at rebutting the presumption of *animus iniuriandi*.

(a) *The difference between motive and intent*

The first explanation for the failure of jest as a defence rebutting the presumption of *animus iniuriandi* boils down to the subtle but important distinction between the defendant’s motive and their legal intention. The former denotes the defendant’s wish or desire to perform certain

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<sup>13</sup> Neethling, Potgieter & Roos op cit note 9 at 243.

<sup>14</sup> 1916 TPD 114.

<sup>15</sup> Neethling, Potgieter & Roos op cit note 9 at 243.

<sup>16</sup> Ibid at 243–4, especially footnote 412.

<sup>17</sup> *Le Roux* supra note 4 paras 129–137.

<sup>18</sup> The Court did so when the majority entertained the uncoupled approach to jest and considered the boys’ plea that their intention to joke ought to rebut the presumption of their intention to defame.

<sup>19</sup> Van der Walt & Midgley op cit note 8 para 134 footnote 1.

<sup>20</sup> *Maisel v Van Naeren* 1960 (4) SA 836 (C) at 840.

<sup>21</sup> *Masch* supra note 14; *Le Roux* supra note 4; *Pudney v Engler* [2016] JOL 37379 (WCC).

conduct or to bring about a certain consequence, whereas the latter denotes the defendant's manifestation of their will.<sup>22</sup> Motive concerns the defendant's underlying reasons for conducting themselves as they did, whereas intention concerns the defendant's willingness in actually performing said conduct.<sup>23</sup> Aside from the determination of wrongfulness and the awarding of damages, the law of defamation is largely uninterested in the motive behind the defendant's defamatory publication.<sup>24</sup> As such, why the defendant published the defamatory statement is irrelevant to the question of whether they should be held responsible for publishing it. The defendant need not have acted with a bad, improper or wicked motive, nor with a necessarily good or laudable object in mind, to be considered as having had the legal intention to defame.<sup>25</sup>

The difference between motive and intent appears to have influenced the conclusions reached by both Harms DP and Brand AJ — for the Supreme Court of Appeal and the Constitutional Court respectively — in *Le Roux*. In the Supreme Court of Appeal, the boys argued 'that they did not have the intention to defame the plaintiff because their intention was to make a joke'.<sup>26</sup> However, Harms DP for the majority said: 'I do not believe that jest excludes the intention to injure. It goes to motive and ... if a joke is degrading the defendant's motive does not matter.'<sup>27</sup> Similarly, in the Constitutional Court, Brand AJ for the majority said that 'established principles of our law dictate that motive to raise a laugh and not to injure, in itself, would not exclude *animus iniuriandi*.'<sup>28</sup> As such, the boys' motive to amuse their fellow classmates was deemed insufficient to rebut the presumption of their injurious intention.

The reason why the motive to raise a laugh, however laudable this motive may be, does not rebut the presumption of intention to injure is precisely because such a motive actuated the defendant to perform conduct that they either knew to be, or reasonably foresaw as being, injurious of the plaintiff.<sup>29</sup> So, where the defendant is motivated to raise a laugh by way of publishing a defamatory statement concerning the plaintiff, the defendant's liability will not be exculpated for the very reason that the defendant, fully appreciating the wrongfulness of their

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<sup>22</sup> *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 154.

<sup>23</sup> *Gluckman v Schneider* 1936 AD 151 at 159–60.

<sup>24</sup> Van der Walt & Midgley op cit note 8 para 139; FDJ Brand 'Defamation' in *LAWSA* 3 ed Volume 14 (2017) para 135; Neethling, Potgieter & Roos op cit note 9 at 86–7.

<sup>25</sup> *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92 at 131.

<sup>26</sup> *Le Roux v Dey* 2010 (4) SA 210 (SCA) para 26.

<sup>27</sup> *Ibid* para 40. Footnotes omitted.

<sup>28</sup> *Le Roux* supra note 4 para 131.

<sup>29</sup> *Ibid*.

conduct, directed their will at the plaintiff's injury.<sup>30</sup> Why they did so does not affect *that* they did so, and so motive to amuse does not render the defendant's conduct any less intentional.<sup>31</sup>

Despite motive being insufficient to rebut the presumption of *animus iniuriandi* in and of itself, evidence of the defendant's innocent, as opposed to improper, motive may be useful to the extent that it serves to evince the absence of the defendant's intention to injure.<sup>32</sup> What such evidence might look like and the kinds of facts that it must aver to rebut the presumption of intention successfully have never been exhaustively defined.<sup>33</sup> Given that evidence as to motive failed to rebut the presumption of intention in *Masch*, *Le Roux* and *Pudney*, the evidence tendered in those cases is of little probative value. It might be more fruitful to gather examples of such evidence from defamation cases concerning the other defences aimed at rebutting the presumption of *animus iniuriandi*, namely mistake and provocation (*rixa*).

Concerning mistake, evidence could be tendered that the defendant lacked consciousness of wrongfulness because they in good faith believed that their statement was covered by one of the existing defences even though it was not. For example, where the defendant believed that their statement was true and for the public benefit even though it was false,<sup>34</sup> or where the defendant believed that their statement had been made on a privileged occasion when in fact the occasion was not a privileged one.<sup>35</sup> Concerning provocation, evidence could include what witnesses deposed to when describing what took place between the plaintiff and the defendant,<sup>36</sup> as such evidence could betray the defendant's annoyance and excitement to such a degree that it might negate their having acted *animo iniuriandi*.<sup>37</sup> The defendant's own demeanour as a witness can also bear on whether their version of events is accepted.<sup>38</sup>

It thus remains to be seen in future cases whether evidence of the defendant's jocular motive will assist the defendant in rebutting the presumption. However, subsection (b) below explains that the presumption of the defendant's injurious intention, which operates in the plaintiff's favour, is nonetheless exceedingly difficult to rebut.

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<sup>30</sup> Ibid para 132.

<sup>31</sup> Ibid para 133.

<sup>32</sup> *Whittaker* supra note 25 at 124–5; *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 104.

<sup>33</sup> Brand op cit note 24 para 135.

<sup>34</sup> *Muller v SA Associated Newspapers Ltd* 1972 (2) SA 589 (C) at 592–4.

<sup>35</sup> *Maisel* supra note 20 at 840 and 850–1.

<sup>36</sup> *Taute v Odendal* (1906) 23 SC 691 at 692.

<sup>37</sup> *Clark v Gadd* 1910 EDL 278 at 286–8.

<sup>38</sup> *Jeftha v Williams* 1981 (3) SA 678 (C) at 684; *Jasat v Paruk* 1983 (4) SA 728 (N) at 734.

(b) *The difficulty in disproving the presumption of intention*

The second explanation for the failure of jest as a defence rebutting the presumption of *animus iniuriandi* can be attributed to the evidential difficulty implicit in disproving the presumption of intention. The place to begin is with the underlying justification for the presumption of the defendant's injurious intention in the law of defamation. The standard justification for the presumption is typically glossed over by judges in defamation cases by way of pithy dicta explaining, quite simply, that it is too cumbersome, difficult or onerous to expect the plaintiff to prove the defendant's actual intention.<sup>39</sup> Notable examples of such dicta include the remarks of De Villiers CJ in *Dippenaar v Hauman*,<sup>40</sup> as well as those of Innes CJ in *Sutter v Brown*.<sup>41</sup>

However, the justification for the existence of the presumption of *animus iniuriandi* in the law of defamation is controversial. At face value, it is rather odd that the law of defamation does not require the plaintiff to prove one of its defining, and arguably most fundamental, elements.<sup>42</sup> This situates the law of defamation in a unique class within the law of delict more generally, and even within the *actio iniuriarum* more specifically. Strict liability and fault-based liability in the form of negligence are insufficient.<sup>43</sup> Fault in the form of intention is required, but the plaintiff need only plead the existence of *animus iniuriandi*. They are otherwise assisted by the presumption as to its presence once they have made out a prima facie case of defamation.<sup>44</sup>

Even if one accepts that there are sound reasons for the existence of the presumption of *animus iniuriandi* in the law of defamation, it must be possible for the defendant to rebut this presumption. Otherwise it becomes a conclusive, and not a rebuttable, presumption.<sup>45</sup> Although the mere possibility of being rebutted is a low bar for the presumption to meet, and one that is admittedly cleared by the existing defences, the defences aimed at rebutting the presumption of intention rarely succeed in practice.<sup>46</sup> This can be attributed to the fact that the pragmatic

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<sup>39</sup> K Moshikaro 'Unjust contempt as the "gist" of defamation law' (2022) 12 *Constitutional Court Review* 59 at 73: 'the usual justification for presumptions of this kind tends to be because a substantive requirement is *too difficult or onerous to prove* or that some weighty principle of justice requires the law to stack the deck in the plaintiff's favour.' Emphasis added.

<sup>40</sup> (1878) 8 Buch 135 at 143.

<sup>41</sup> 1926 AD 155 at 163.

<sup>42</sup> Of course, whether *animus iniuriandi* is indeed so important to the law of defamation is contested by the likes of RG McKerron *The Law of Delict* 7 ed (1971) at 171.

<sup>43</sup> Although, this does depend on whether one views the defence of reasonable publication as essentially being a defence of absence of negligence.

<sup>44</sup> *Moaki* supra note 32 at 104.

<sup>45</sup> *Botha v Mthiyane* 2002 (1) SA 289 (W) para 51.

<sup>46</sup> Of course, that the defences of jest, mistake and *rixa* have not succeeded in most of the cases in which they have been raised is no reason to discount the possibility that such defences could, at least in theory, succeed.

justification undergirding the presumption of intention affects the defendant in equal measure. That is, the evidential difficulty implicit in requiring the plaintiff to prove that the defendant acted with injurious intention cuts both ways in the sense that, once it has been established that the defendant published a defamatory statement concerning the plaintiff, it is very difficult for the defendant to adduce evidence which proves that they lacked the intention to injure.<sup>47</sup> This difficulty is further compounded by the uncertain nature of the burden that is placed on the defendant seeking to rebut the presumption of intention.

It is trite that a bald denial of intention to defame is insufficient to rebut the presumption.<sup>48</sup> For a while there existed considerable confusion concerning whether the defendant was saddled with either a mere evidentiary burden (*'weerleggingslas'* in Afrikaans) of adducing evidence sufficient to place the court in doubt as to whether the defendant had acted with defamatory intent, or a full onus of rebutting the presumption of intention on a preponderance of probabilities.<sup>49</sup> Most textbook authors contend that it has since been confirmed by both the Supreme Court of Appeal and the Constitutional Court that the defendant bears a full onus, and not merely an evidential burden of adducing evidence, when rebutting both the presumption of wrongfulness *and* that of intention.<sup>50</sup>

It must be pointed out, however, that these secondary sources cite the Supreme Court of Appeal cases of *Hardaker v Phillips*<sup>51</sup> and *Naylor v Jansen; Jansen v Naylor*,<sup>52</sup> as well as the Constitutional Court case of *Le Roux v Dey*,<sup>53</sup> in support of the various authors' contention. Upon a closer reading of these three cases, however, all of them cite a passage from the Appellate Division's judgment in *Mohamed v Jassiem*,<sup>54</sup> which itself relied on a passage from the Appellate Division's judgment two years earlier in the case of *Neethling v Du Preez; Neethling v The Weekly Mail*.<sup>55</sup>

The latter decision quite clearly confirmed only that the defendant bears the full onus of establishing the defences of truth for the public benefit and qualified privilege on a balance of

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<sup>47</sup> It is perhaps for this reason that Voet reversed the presumption of intention, and consequently the burden of rebuttal, in instances of jest. See J Voet *The Selective Voet: Being the Commentary on the Pandects* translated by P Gane (1955) at 242–4; *Maisel* supra note 20 at 841.

<sup>48</sup> *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 403.

<sup>49</sup> *Borgin v De Villiers* 1980 (3) SA 556 (A) at 571E–G; *May v Udwin* 1981 (1) SA 1 (A) at 10C–E; *Marais v Richard* 1981 (1) SA 1157 (A) at 1166F–1170A.

<sup>50</sup> Van der Walt & Midgley op cit note 8 para 147; Brand op cit note 24 para 123; Neethling, Potgieter & Roos op cit note 9 at 240, especially footnote 392.

<sup>51</sup> 2005 (4) SA 515 (SCA) para 15.

<sup>52</sup> 2006 (3) SA 546 (SCA) para 7.

<sup>53</sup> *Le Roux* supra note 4 para 85.

<sup>54</sup> 1996 (1) SA 673 (A) at 709H–I.

<sup>55</sup> 1994 (1) SA 708 (A) at 770H–I.

probabilities to successfully rebut the presumption of wrongfulness.<sup>56</sup> It said nothing concerning the nature of the defendant's onus when rebutting the presumption of intention. If anything, Hoexter JA simply questioned whether the judgment of Rumpff CJ in *SAUK v O'Malley*<sup>57</sup> can in fact be read as definitively saying that the burden to rebut the presumption of wrongfulness was ever an evidentiary one.<sup>58</sup> So, although it is technically correct to say that it has been confirmed by both the Supreme Court of Appeal and the Constitutional Court that the defendant is also saddled with the full onus of rebutting the presumption of intention on a preponderance of probabilities,<sup>59</sup> both superior courts are mistaken because their conclusions are based on a misreading of *Mohamed* and *Neethling*.

Of course, notwithstanding this error, it may be that the defendant seeking to rebut the presumption of intention *ought* to be required to do so on a balance of probabilities. There are good reasons for this, not least because those defences aimed at rebutting the presumption of wrongfulness place such an onus on the defendant.<sup>60</sup> However, if one accepts that the defendant indeed bears the full onus of rebutting the presumption of intention on a preponderance of probabilities, then the absence of the defendant's intention becomes even more cumbersome, difficult and onerous for the defendant to prove.<sup>61</sup>

An evidentiary burden is obviously a lower threshold for the defendant to meet.<sup>62</sup> It does not require the defendant to establish the lack of their intention to defame on a more stringent preponderance of probabilities. It requires only that the defendant adduce evidence refuting the presumption of their intention to defame sufficient to leave the court in doubt on the issue.<sup>63</sup> The defendant's absence of injurious intention must be deduced from the nature of the occurrence as well as all other external, objective facts and circumstances from which inferences as to their innocent state of mind can be drawn.<sup>64</sup> It was noted above that what such evidence will look like, and the kinds of facts that the defendant must aver to successfully rebut

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<sup>56</sup> *Ibid.*

<sup>57</sup> *O'Malley* supra note 48.

<sup>58</sup> *Neethling* supra note 55 at 767–9.

<sup>59</sup> Van der Walt & Midgley op cit note 8 para 147; Brand op cit note 24 para 123; Neethling, Potgieter & Roos op cit note 9 at 240, especially footnote 392.

<sup>60</sup> *Neethling* supra note 55 at 770H–I. Although, J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) at 245–50 argues that even requiring the defendant to establish a defence rebutting the presumption of wrongfulness on a preponderance of probabilities could constitute an unreasonable and unjustifiable limitation on the defendant's right to freedom of expression.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Botha* supra note 45 paras 53–4.

<sup>63</sup> *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548F–G.

<sup>64</sup> *Maisel* supra note 20 at 840.

the presumption, cannot be exhaustively defined. The evidence put forward by the defendant will be case-specific.<sup>65</sup>

Yet even if such evidence is adduced, the prospect of the defendant successfully rebutting the presumption of intention will be less if they are deemed to bear the full onus as opposed to a mere evidential burden. However, as subsection (c) below points out, the presumption of the defendant's injurious intention is difficult to rebut regardless of the nature of the onus that befalls the defendant, due to the significant overlap between the risky enterprise of joke-telling and the wide-reaching nature of the standard of intention that is *dolus eventualis*.

(c) *The overlap between joke-telling and dolus eventualis*

The third and final explanation for the failure of jest as a defence rebutting the presumption of *animus iniuriandi* can be attributed to the wide-reaching nature of the standard of intention known as *dolus eventualis*.<sup>66</sup> In the law of defamation, *dolus eventualis* will be present where, although not the defendant's primary aim and object, they subjectively foresaw the possibility of defaming the plaintiff, reconciled themselves with this possibility and published the defamatory material anyway.<sup>67</sup> *Dolus eventualis* is typically broken down into its two constituent components, namely the cognitive and the conative (or volitional).<sup>68</sup>

The first concerns the defendant's subjective foresight of the possibility of the plaintiff's defamation resulting from their publication,<sup>69</sup> whilst the second concerns the defendant's recklessness in nonetheless publishing the defamatory statement.<sup>70</sup> With respect to the first requirement, the defendant need not have foreseen the *probability* of the plaintiff's defamation occurring, but merely the *possibility* that it might occur.<sup>71</sup> However, whether this possibility itself needs to be a real, reasonable or remote one is contentious.<sup>72</sup> With respect to the second requirement, the defendant's conduct in publishing the defamatory material must have been

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<sup>65</sup> *Clark* supra note 37 at 288; *Muller* supra note 34 at 592–3.

<sup>66</sup> This standard of intention has always been controversial, but it has attracted heightened scrutiny in the wake of the infamous Oscar Pistorius murder trial. See *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA) paras 26–9.

<sup>67</sup> Burchell op cit note 5 at 166. That *dolus eventualis* is sufficient for defamatory liability to result can be inferred from *Nasionale* supra note 3 at 99–100: '[I]t is a principle of our law which applies as well to libel and slander as to other wrongs that if a man acts recklessly, not heeding whether he will or will not injure another, he cannot be heard to say that he did not intend to hurt.'

<sup>68</sup> SV Hoctor 'Criminal Law' in *LAWSA* 3 ed Volume 11 (2017) para 89.

<sup>69</sup> *Ibid* paras 90–1.

<sup>70</sup> *Ibid* para 92.

<sup>71</sup> *R v Horn* 1958 (3) SA 457 (AD) at 464–7.

<sup>72</sup> S Hoctor 'The degree of foresight in *dolus eventualis*' (2013) 26 *SAJCJ* 131.

reckless.<sup>73</sup> Recklessness here simply means that the defendant must have reconciled themselves with the possible defamatory consequence of their conduct in the sense that they took it into account but nonetheless remained indifferent to the risk materialising and so published the defamatory statement anyway.<sup>74</sup>

That *dolus eventualis* poses a potential stumbling block for the defendant who raises jest as a defence rebutting the presumption of intention was alluded to by De Villiers as early as 1899,<sup>75</sup> and later by Van der Merwe and Olivier in 1980.<sup>76</sup> In 2007, Danie Visser cautioned that even if it were accepted that jest could serve to rebut the presumption of *animus iniuriandi*, ‘the presence of *dolus eventualis* could prevent the defendant’s escape along this avenue.’<sup>77</sup> And that is exactly what happened in 2011 when Brand AJ for the majority of the Constitutional Court in *Le Roux* held that the boys had intention in the form of *dolus eventualis* because they had foreseen the possibility that their attempt at humour might be defamatory of Dr Dey and nonetheless proceeded to publish the defamatory image anyway.<sup>78</sup>

This subsection submits that *dolus eventualis*, which is an elastic and far-reaching standard of intention,<sup>79</sup> arguably casts the net of liability too wide in instances of defamatory humour precisely because humour is, by definition, risky. American humourist Erma Bombeck once remarked that there is ‘a thin line that separates laughter and pain, comedy and tragedy, humor and hurt.’<sup>80</sup> The strength of a joke often rests on how delicately it toes that line. Jokes that draw on our edgiest sensitivities attract deeper appreciation and heartier laughter,<sup>81</sup> but such jokes also ignite the itch to protect because there is ‘some point at which the tickle becomes a scratch.’<sup>82</sup>

The element of risk implicit in humour explains why a good sense of humour and wit are such revered character traits. It is generally taken as a sign of competence, confidence and

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<sup>73</sup> *S v Sigwahla* 1967 (4) SA 566 (A) at 570B–C.

<sup>74</sup> *S v Ngubane* 1985 (3) SA 677 (A) at 685F–G. Although, see *S v Humphreys* 2015 (1) SA 491 (SCA) paras 16–19 for the troubling situation in which the accused was held not to have been reckless because they did in fact care about — ie they were not indifferent to — the possible lethal consequences of their conduct.

<sup>75</sup> De Villiers op cit note 11 at 195.

<sup>76</sup> NJ Van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 4 ed (1980) at 444.

<sup>77</sup> D Visser ‘Compensation for harm to the personality — the *actio iniuriarum*’ in F du Bois (ed) *Wille’s Principles of South African Law* 9 ed (2007) at 1189.

<sup>78</sup> *Le Roux* supra note 4 paras 131–3. Of course, although Brand AJ was correct to note the boys’ foresight (‘they knew that any person whose face was pasted on that picture would be’) and recklessness (‘carried on regardless of the consequences’), his understanding of the harm of defamation as being Dr Dey’s humiliation and degradation was mistaken. See Chapter 4IV above.

<sup>79</sup> *S v Mienies* 1978 (4) SA 560 (A) at 562A–B.

<sup>80</sup> E Bombeck *If Life Is a Bowl of Cherries, What Am I Doing in the Pits?* (1978) at 198.

<sup>81</sup> LE Little ‘Judicial regulation of humour in the United States’ in JM Davis & SR Anleu (eds) *Judges, Judging and Humour* (2018) at 286.

<sup>82</sup> CD Glasberg ‘Who has the last laugh — a look at defamation in humor’ (1989) 9 *Loyola of Los Angeles Entertainment Law Review* 381 at 381.

intelligence if one can skilfully straddle the line between actual insult and inappropriate social commentary on the one hand, and humour and apt social commentary on the other.<sup>83</sup> Yet every jokester knows that their attempt at humour runs the concomitant risk, to a smaller or greater degree depending on the context, of ‘falling flat’ and ‘missing the mark’ in the sense that their audience might not ‘get it’ and instead take the joke seriously.<sup>84</sup> It follows that where the reasonable observer takes a joke to be seriously asserting something defamatory about the plaintiff, the jokester will always have had intention in the form of *dolus eventualis* because they subjectively foresaw the possibility of their joke defaming someone, nonetheless reconciled themselves with this possibility and told the joke anyway.<sup>85</sup> If such foresight — ‘I know that this joke might not land’ — and recklessness — ‘but it is so funny that publishing it is worth the risk’ — are intrinsic to joke-telling, then any jokester who raises jest as a defence aimed at rebutting the presumption of intention is doomed to fail. It would be nigh on impossible for the defendant ever to argue successfully that they did not direct their will at defaming the plaintiff, thereby effectively hamstringing the efficacy of the defence.

One solution to this dilemma would be to forego *dolus eventualis* as a sufficient standard of intention for defamation. Perhaps those who raise jest as a defence rebutting the presumption of intention ought only to be required to prove, on a balance of probabilities or otherwise, that they did not directly (*dolus directus*) or indirectly (*dolus indirectus*) intend the plaintiff’s defamation. There are good reasons for curtailing the applicability of *dolus eventualis* in certain instances, one being that the breach of a legal duty not to act recklessly should only be punished where the interest at stake is simply too valuable.<sup>86</sup> For example, the legal interests of life and sexual autonomy are arguably so revered that *dolus eventualis* sits comfortably as a standard of intention sufficient for the crimes of murder and rape. It is debatable whether the plaintiff’s legal interest in their reputation is so valuable that the imposition of liability upon the defendant who only has intention in the form of *dolus eventualis* is justified.<sup>87</sup>

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<sup>83</sup> TB Bitterly, AW Brooks & ME Schweitzer ‘Risky business: When humor increases and decreases status’ (2017) 112 *Journal of Personality and Social Psychology* 431.

<sup>84</sup> Indeed this seems intuitive. I imagine that we all have been faced countless times with the decision whether to say the joke that we have in mind or to bite our tongue.

<sup>85</sup> This is most certainly the case for certain kinds of humour such as parody and satire, both of which are almost always created intentionally. See Van der Walt & Midgley op cit note 8 para 142 footnote 5.

<sup>86</sup> V Tadros *Criminal Responsibility* (2007) at 225–35.

<sup>87</sup> Of course, there are strong counterarguments to this claim. One would be that liability is either strict or fault based. Within fault-based liability, the question is whether fault in the form of negligence or intention is sufficient. Where only intention to the exclusion of negligence has been deemed sufficient, as is arguably the case in the law of defamation, intention in all its variants (*directus*, *indirectus* and *eventualis*) ought to apply.

However, even if the standard of intention required for liability for defamation were raised to preclude *dolus eventualis*, the explanations provided in subsections (a) and (b) above would still apply with equal force. That is, the evidential difficulty implicit in disproving the presumption of the defendant's injurious intention, which takes no notice of their jocular motive, still besets the defendant regardless of the standard of intention required. Cumulatively, these three explanations lead one to conclude that jest is ill-suited as a defence rebutting the presumption of *animus iniuriandi*. Considering that its prospects of success are so dire, there is value in exploring the possibility that defamatory, albeit humorous, publications might find better protection under the defences aimed at rebutting the presumption of wrongfulness instead.

### III JEST AS A DEFENCE REBUTTING WRONGFULNESS

The previous section explained that it is remarkably difficult for the defendant to successfully argue that their humorous, albeit defamatory, statement was published unintentionally. Jest has failed to rebut the presumption of *animus iniuriandi* and to excuse the defendant of liability for defamation in all three of the South African cases in which it has been raised to date.<sup>88</sup> In light of its slim prospects of success, Van der Walt and Midgley contend that jest might find a safer home as a defence aimed at rebutting the presumption of wrongfulness.<sup>89</sup> The authors submit that the enquiry into the lawfulness of the defendant's conduct would better cater for the nuance between legitimate and illegitimate jokes by allowing the dictates of public policy to determine whether the defendant ought to be vested with liability for defamation in a particular case.<sup>90</sup> They venture to suggest that society would approve of a joke at which the subject can laugh but disapprove of a joke that is insulting and offensive to, or degrading of, the plaintiff.<sup>91</sup>

The creation of a defence of jest aimed at rebutting the presumption of wrongfulness appears to be an attractive alternative in response to its repeated failure as a defence rebutting the presumption of intention. However, the dichotomy put forward by Van der Walt and Midgley between humour that is deemed legitimate and therefore lawful, and humour that is deemed illegitimate and therefore unlawful, is not as useful as they make it out to be. The authors hold that society will approve of and therefore deem lawful a joke at which the subject can laugh and disapprove of and therefore deem unlawful a joke at which the subject does not

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<sup>88</sup> *Masch* supra note 14; *Le Roux* supra note 4; *Pudney* supra note 21.

<sup>89</sup> Van der Walt & Midgley op cit note 8 para 134.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

laugh.<sup>92</sup> But that distinction does not resolve the dilemma, for if the joke's subject can, and perhaps does, laugh at the defendant's joke, they are unlikely to sue the defendant for defamation. The issue of whether such jokes are lawful thus never arises for determination. On the contrary, it is precisely when the plaintiff does not laugh at the defendant's joke that they will likely pursue the defendant in an action for defamation.

If the court finds that the reasonable observer would deem the defendant's joke to be defamatory of the plaintiff, only then does the question arise whether such jokes ought to be deemed lawful. In answering this question, the issue of the joke's defamatoriness has already been decided. The outstanding issue is whether society, notwithstanding the defamatoriness of the defendant's statement, would nonetheless consider the defendant's defamatory joke to be justified and so not wrongful — ie lawful — under the circumstances. At the justification stage, the joke's illegitimacy has already been established in the sense that the reasonable observer understood the defendant's statement to be asserting something defamatory of the plaintiff. It is thus unhelpful for the wrongfulness determination to turn on whether society views the defendant's statement as one which the plaintiff should not have taken seriously, given that the very same society has already held that the reasonable observer would have taken the defendant's statement seriously.

This section builds on the authors' suggestion, however, and evaluates the viability of jest as a defence rebutting the presumption of wrongfulness. It begins by (a) assessing the extent to which defamatory humour is already protected by the traditional defences aimed at rebutting the presumption of the defendant's wrongfulness, namely (i) truth for the public benefit, (ii) fair comment, (iii) privileged occasion and (iv) reasonable publication.<sup>93</sup> The requirements of each defence are summarised, whereafter their scope for the protection of defamatory humour is demonstrated by way of examples. The precise limits of the existing defences are also delineated to identify the exact instance of defamatory humour that will not be covered by any of the existing defences. Once this class of statements has been demarcated, subsection (b) argues that there is greater scope for the protection of defamatory humour under the defence of qualified privilege.

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<sup>92</sup> Ibid.

<sup>93</sup> Although the first three are typically categorised as being the *traditional* defences, with the last often being labelled a *new* defence, the defence of reasonable publication has been available for the last 25 years, hence its inclusion under this heading.

(a) *Humour under the existing defences*

This subsection evaluates the extent to which humorous defamatory publications might find refuge under the traditional defences that already exist to rebut the presumption of wrongfulness. Only those defences that are specific to defamation, and not those available in the law of delict more generally, are addressed.<sup>94</sup> They are (i) truth for the public benefit, (ii) fair comment, (iii) privileged occasion and (iv) reasonable publication. The requirements of each defence are set out first, whereafter the scope of each for the protection of defamatory humour is discussed.

(i) Truth for the public benefit

To satisfy this defence, the defendant's defamatory statement must be (1) true and (2) for the public benefit.<sup>95</sup> Concerning truth, the statement need not be true in every respect, except where a specific charge of fraud, dishonesty or criminal conduct is attributed to the plaintiff. A degree of exaggeration is acceptable if the gist or sting of the defamation is substantially true.<sup>96</sup> Concerning public benefit, the publication of true information is usually for the public benefit. However, the publication must not be misleading in the sense that it is only half-true, and the truth itself should not be gratuitous. It should not 'rake up the past' nor disclose facts concerning the plaintiff that are deeply personal and private.<sup>97</sup> Factors to consider when determining whether the publication of the truth was for the public benefit include the subject matter of the material as well as the time, manner and occasion of the publication.<sup>98</sup> Where the defendant succeeds in establishing these requirements on a balance of probabilities, their conduct is justified and deemed lawful. The plaintiff may not defeat this defence by proof of malice or improper motive on the part of the defendant.<sup>99</sup>

It is trite that '[m]any a true word may be spoken in jest',<sup>100</sup> and humour 'is often funny because it caricatures the truth, stretching it into absurd and funny shapes.'<sup>101</sup> Therefore, it is possible that defamatory jokes might find refuge under the defence of truth for the public

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<sup>94</sup> Such as consent, necessity and private defence.

<sup>95</sup> *Botha v Brink* (1878) 8 Buch 118 at 124.

<sup>96</sup> *Johnson v Rand Daily Mails* 1928 AD 190 at 204–7.

<sup>97</sup> *Graham v Ker* (1892) 9 SC 185 at 187.

<sup>98</sup> *Patterson v Engelenburg & Wallach's Ltd* 1917 TPD 350 at 361.

<sup>99</sup> *Williams v Shaw* (1884) 4 EDC 105 at 148.

<sup>100</sup> *Peck v Katz* 1957 (2) SA 567 (T) at 573.

<sup>101</sup> SD Scott 'From satirical to satyrical: when is a joke actionable?' (1990) 13 *Hastings Communications and Entertainment Law Journal* 141 at 175.

benefit if the facts disclosed by the joke are substantially true and it is in the public interest to disclose those facts. In *Pudney*, for example, the defendant editor had published a photograph of the plaintiff clown in an article titled ‘25 things that suck’ in which clowns were ridiculed as resembling grown men with long-term *tik* habits.<sup>102</sup> The allegation of drug addiction is not itself prima facie defamatory, but it may be so where the addiction impacts the plaintiff’s competence in their profession.<sup>103</sup> Had it been true that Mr Pudney was in fact addicted to drugs, then the defendant might have been covered by the defence of truth for the public benefit, because there is undoubtedly a public interest in the disclosure of drug addiction, even if that addiction was privately satisfied, where the plaintiff is involved in a line of work that predominantly places them in the company of impressionable children.<sup>104</sup>

One can think of many other examples of jokes that would be covered by the defence of truth for the public benefit. Any joke that riffs off facts about the plaintiff that are both true and in the public interest to disclose will be protected. For example, a joke that is constructed around Harvey Weinstein’s misdeeds would be protected because it would be both true and in the public interest to make it known that Harvey Weinstein had sexually assaulted and raped multiple women.<sup>105</sup> However, there are two classes of statements that are not protected by the defence of truth for the public benefit. The first is statements that cannot be proven to be true, and the second is statements that allege facts which, although substantively true, are not in the public interest to disclose.

Falsity is not an element of the delict of defamation. As such, the plaintiff need not allege nor prove the falsity of the defendant’s statement.<sup>106</sup> It is for the defendant to prove the substantial truth of the allegations made if they wish to rely on truth as a defence.<sup>107</sup> So, the defendant who deliberately peddles outright falsehoods and masquerades their lies as being the truth will not be covered by this defence. But neither will the defendant who cannot prove the substantive truth of their claim, even where they allege facts that could potentially be, or perhaps probably are, true. For example, were Michael Jackson still alive, because the dead cannot be defamed,<sup>108</sup> jokes about his alleged paedophilia might not find adequate protection

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<sup>102</sup> *Pudney* supra note 21 para 4.

<sup>103</sup> *Lieberthal v Primedia Broadcasting (Pty) Ltd* 2003 (5) SA 39 (W) at 49.

<sup>104</sup> *Pudney* supra note 21 para 65.

<sup>105</sup> *People v Weinstein* 38 NY App 3d 1154 (2022).

<sup>106</sup> Brand op cit note 24 para 124.

<sup>107</sup> *Johnson* supra note 96 at 204.

<sup>108</sup> Burchell op cit note 5 at 136–42.

under this defence, because the substantive truth of that particular allegation might be more difficult for the defendant to prove given that it was not established at trial.<sup>109</sup>

Yet the ‘truth alone is no defence’.<sup>110</sup> Even if substantively true, the defendant’s statement must still allege the existence of facts the disclosure of which would be in the public interest. Although there is clearly a public interest in disclosing the truth about the integrity and conduct of public persons such as Harvey Weinstein,<sup>111</sup> it is less clear whether a similar public interest exists with respect to the integrity and conduct of private persons.<sup>112</sup> But even jokes that are constructed around defamatory truths about public figure plaintiffs must disclose truths that are of public, not private, concern.<sup>113</sup> Further still, even if the facts disclosed ordinarily would be of public concern, the joke cannot simply rehash ‘old scandals for the sake of satisfying the salacious appetite of readers’.<sup>114</sup> The defence of truth for the public benefit is thus severely qualified.

A good example of a joke which, although true, might have disclosed facts that were not for the public benefit is that told by M-Net Idols judge Somizi Mhlongo in 2017, which was described already in Chapter 1.<sup>115</sup> Whilst hosting the South African Music Awards, Somizi made a joke at the expense of the popular singer Zahara in which he jabbed at her publicly acknowledged drinking problems. He quipped that Zahara, who was not present in person at the awards-show, was probably absent because she was enjoying a drink at the event’s free bar. Although some audience members laughed at Somizi’s joke, others audibly groaned and Zahara threatened to sue him for defamation.<sup>116</sup> In such an instance, although it may have been true that Zahara was an alcoholic, it is questionable whether it was for the public benefit to redisclose this information.

## (ii) Fair comment

To satisfy this defence, the defendant’s defamatory statement must be (1) a comment (2) that is fair and (3) based on true facts (4) that are in the public interest.<sup>117</sup> A comment is not a

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<sup>109</sup> *People v Jackson* 128 Cal App 4d 1009 (2005).

<sup>110</sup> Burchell op cit note 5 at 207.

<sup>111</sup> See Neethling, Potgieter & Roos op cit note 9 at 228 footnote 279 for examples of other public figures.

<sup>112</sup> Burchell op cit note 5 at 214.

<sup>113</sup> *Botha v Pretoria Printing Works Ltd* 1906 TS 710 at 715.

<sup>114</sup> *Yusaf v Bailey* 1964 (4) SA 117 (W) at 127.

<sup>115</sup> IOL ‘Zahara “sues” Somizi over “alcoholic” joke at #SAMA23’ *IOL* 30 May 2017, available at <https://www.iol.co.za/entertainment/celebrity-news/local/zahara-sues-somizi-over-alcoholic-joke-at-sama23-9426878>, accessed on 13 February 2023.

<sup>116</sup> *Ibid.*

<sup>117</sup> *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) paras 80 and 159.

statement of fact. It is an opinion, which involves a value judgment the truth of which is unverifiable.<sup>118</sup> Sometimes the line between a declaration of fact and an expression of opinion is difficult to draw, so recourse to the reasonable person's recognition of the statement as being either a statement of fact or an expression of opinion is permissible.<sup>119</sup> The comment is fair if it is a good faith and honest expression of opinion that is based on, or relevant to, a reasonable inference from the facts.<sup>120</sup> Such facts must be proven to be substantially true and they must be already known to the ordinary observer, be expressly stated with, or be readily inferred from the defendant's comment.<sup>121</sup> Finally, the comment must concern a matter of public interest, for example, the behaviour of public officials, the management of public bodies, the administration of justice or any other matter that typically invites criticism, such as the publication of art, articles, books, movies, plays and speeches.<sup>122</sup> Where the defendant succeeds in establishing these requirements on a balance of probabilities, their conduct is justified and deemed lawful. However, the plaintiff may defeat this defence by proof of malice or improper motive on the part of the defendant.<sup>123</sup>

The defence of fair comment arguably offers the greatest protection for humorous defamatory statements. The works of late-night television show hosts and professional political cartoonists often find refuge in this defence and its counterparts in the United States of America, whose First Amendment already offers widespread protection to defamatory opinions,<sup>124</sup> and the United Kingdom, whose common law defence of fair comment was recently abolished and replaced with a statutory defence of honest opinion.<sup>125</sup> Were they ever to end up in court, the cartoons of the popular South African satirist Zapiro may often be protected by this defence.

Zapiro has landed himself in hot water on numerous occasions concerning his satirical cartoons lampooning the African National Congress and its former leader, Jacob Zuma. After Zuma made worrying remarks during his rape trial in 2006, evincing his sincere belief that showering after sexual intercourse with an HIV-positive person could minimise the risk of

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<sup>118</sup> *Crawford v Albu* 1917 AD 102 at 105 and 114.

<sup>119</sup> *Ibid* at 117.

<sup>120</sup> *Citizen* supra note 117 paras 81–4.

<sup>121</sup> *Ibid* paras 88–9 and 92.

<sup>122</sup> Neethling, Potgieter & Roos op cit note 9 at 234 footnote 338.

<sup>123</sup> *Marais* supra note 49 at 1170C–E.

<sup>124</sup> Glasberg op cit note 82; CL Amspacher & RS Springer 'Humor, defamation and intentional infliction of emotional distress: The potential predicament for private figure plaintiffs' (1990) 31 *William & Mary Law Review* 701; Scott op cit note 101; JH King 'Defamation claims based on parody and other fanciful communications not intended to be understood as fact' 2008 *Utah Law Review* 875.

<sup>125</sup> United Kingdom Defamation Act 2013 (c 26) s 6.

contracting the virus,<sup>126</sup> Zapiro caricatured Zuma by persistently drawing him with a showerhead emerging from the top of his spine and towering over him.<sup>127</sup> In 2008, Zapiro drew a particularly controversial cartoon that depicted the impending rape of Lady Justice by Zuma and his ardent supporters. Although Zuma threatened to sue Zapiro for R4 million in damages for defamation, the lawsuit was ultimately dropped.<sup>128</sup>

Of course, rape does not spring to mind as being a patently humorous matter. However, there is scope under the defence of fair comment for the protection of Zapiro's cartoons and jokes that are grounded in similarly taboo subjects — remember the release theory of humour — *if* such statements can be couched as being fair comments upon facts that are proven to be substantially true and are in the public interest to disclose. For example, Zapiro's cartoon qualifies as a comment and not a statement of fact. Zapiro is not making a factual claim that Zuma had actually raped anyone, because Lady Justice is not a real person. Instead, Zapiro is expressing his opinion that Zuma was abusing the justice system, which Zapiro metaphorically likens to the crime of rape. Zapiro's comment is fair because it is an honestly held opinion that was relevant to the facts upon which it was based at the time. Such facts are substantially true and well-known, as Zuma had been publicly embroiled in allegations of corruption for many years and had just been officially charged for corruption at the time of the cartoon's publication. Finally, the comment is on a matter of public interest, for it pertained to a public figure's (Zuma's) behaviour with respect to his Stalingrad legal tactics and continued undermining of the State's attempts to prosecute him.<sup>129</sup>

There are many other examples of satire that would be protected by this this defence. One recent example is that of a photoshopped front cover of the respectable *Time* magazine depicting the President of the Russian Federation, Vladimir Putin, sporting a Hitler moustache. Given the ongoing invasion of Ukraine by Russia, the publication would be protected as being the author's fair comment that Putin is a genocidal maniac and war criminal akin to Adolf Hitler.<sup>130</sup> Another recent example is that of a cartoon depicting the President of the Republic

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<sup>126</sup> *S v Zuma* 2006 (2) SACR 191 (W) at 223–4.

<sup>127</sup> For a collection of these cartoons, see Zapiro *WTF: Capturing Zuma – A Cartoonist's Tale* (2018).

<sup>128</sup> G Underhill & V Pillay 'Zapiro cartoon: Zuma surrenders, drops lawsuit' *Mail & Guardian* 28 October 2012, available at <https://mg.co.za/article/2012-10-28-zuma-avoids-zapiro-court-showdown-over-cartoon/>, accessed on 31 January 2023.

<sup>129</sup> D Milo 'South Africa: Zuma v Zapiro and the rape of the justice system' *The International Forum for Responsible Media Blog* 8 November 2012, available at <https://inform.org/2012/11/08/south-africa-zuma-v-zapiro-and-the-rape-of-the-justice-system-dario-milo/>, accessed on 14 February 2023.

<sup>130</sup> A Chatuverdi 'Putin's photo with Hitler moustache, Nazi symbol as Time cover is fake' *NDTV* 28 February 2022, available at <https://www.ndtv.com/world-news/putins-photo-with-hitler-moustache-nazi-symbol-as-time-cover-is-fake-2795132>, accessed on 14 February 2023.

of Türkiye, Recep Tayyip Erdoğan, sodomising the Twitter bird, which would be protected as being the author's fair comment on the suppression of free speech in that country.<sup>131</sup>

But what about the limits of the defence of fair comment for the protection of defamatory humour? Since the distinction between an expression of opinion and a statement of fact is what separates the defence of fair comment from the defence of truth for the public benefit, statements of fact are clearly excluded from the former's protection. So too are comments that are based on facts the truth of which cannot be substantively proven, as well as comments that are based on facts which, although substantively true, are not in the public interest to disclose. As such, jokes that do not assert facts but rather express comments on Weinstein's sexual offences, for example, would be protected. Those expressing comments on Jackson's paedophilia or Zahara's alcoholism would not be.

There remains one further line of delimitation within the narrow band of publications that are comments based on facts that are proven to be substantively true and are in the public interest to disclose. Only those comments that qualify as being fair are protected by the defence. What exactly does fair mean? A comment is fair if it 'does not exceed certain limits'.<sup>132</sup> These limits are the relevance of the comment to the facts disclosed as well as the genuineness of the defendant's opinion.<sup>133</sup> Whether relevance and genuineness are satisfied turns on the overarching objective standard of reasonableness — ie was it reasonable for the defendant both to hold and to express their opinion.<sup>134</sup> Reasonableness here has nothing to do with whether the content of the comment was biased, crucial, harsh, obstinate, partial, prejudiced or vehement. The court's assessment of the quality of the opinion is irrelevant. The opinion simply needs to be one that can be reasonably inferred from the facts.<sup>135</sup>

Concerning the genuineness of the defendant's comment, a comment is only fair — and an opinion is only honestly held — if the comment is made in good faith. However, the defendant need not prove that they sincerely held their opinion.<sup>136</sup> So, the genuineness of their comment will be assumed unless the plaintiff can prove that the statement was uttered with malice or improper motive.<sup>137</sup> Yet malice or improper motive only plays a negative role in the sense that proof of the absence of malice is not a positive requirement that the defendant must

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<sup>131</sup> NL Times 'Erdoğan: Censor Dutch cartoon portraying Turkish leader's sodomy of Twitter mascot' *NL Times* 19 December 2017, available at <https://nltimes.nl/2017/12/19/erdogan-censor-dutch-cartoon-portraying-turkish-leaders-sodomy-twitter-mascot>, accessed on 14 February 2023.

<sup>132</sup> *Crawford* supra note 118 at 115.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Marais* supra note 49 at 1168D–E.

<sup>135</sup> *Citizen* supra note 117 paras 81–4.

<sup>136</sup> *Waring v Mervis* 1969 (4) SA 542 (W) at 546.

<sup>137</sup> *Marais* supra note 49 at 1170C–E.

prove, but the plaintiff's proof of malice or improper motive could reveal that the defendant's comment was not honest because it was not based on an opinion genuinely held, which would in turn defeat the defence.<sup>138</sup>

Evidently not much turns on the requirement of fairness under the defence of fair comment, because a comment will almost always be deemed fair if it is a relevant and genuinely held opinion that is reasonably inferred from the facts upon which it is based. As such, the element of fairness does not do much by way of heavy lifting when satisfying the defence of fair comment, and so the probability of its absence does not pose a discernible obstacle to the coverage afforded by the defence to defamatory humour.

### (iii) Privileged occasion

To satisfy the defence of qualified privilege,<sup>139</sup> the defendant's defamatory statement must be (1) published on an occasion which is recognised as privileged and be (2) relevant to or reasonably connected with the purposes of that occasion.<sup>140</sup> Examples of occasions that have been recognised as privileged over time include statements that were published in the discharge of a duty, the exercise of a right or the furtherance of a legitimate interest;<sup>141</sup> in the course of judicial or quasi-judicial proceedings;<sup>142</sup> and in reports on proceedings of courts, Parliament and public bodies.<sup>143</sup> Whether the statement is relevant to the privileged occasion is determined objectively with reference to the reasonable person standard.<sup>144</sup> Where the defendant succeeds in establishing these requirements on a balance of probabilities, their conduct is justified and deemed lawful. However, the plaintiff may defeat this defence by proof of malice or improper motive on the part of the defendant.<sup>145</sup>

Descheemaeker remarks of qualified privilege that it 'is not so much one defence as an umbrella for a number of situations where the law considers that it is particularly important to let people speak their mind freely without the fear of being held liable for their words.'<sup>146</sup> The

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<sup>138</sup> Burchell op cit note 5 at 230–1.

<sup>139</sup> Although privileged occasion is often divided into absolute and qualified privilege, it is arguable that absolute privilege is not a defence rebutting wrongfulness at all because where a defendant is exempt from liability by virtue of their position, this is an issue of standing and capacity to be sued and not an instance of unlawful conduct being justified. See Van der Walt & Midgley op cit note 8 paras 68 and 128.

<sup>140</sup> *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) para 17.

<sup>141</sup> *De Waal v Ziervogel* 1938 AD 112.

<sup>142</sup> *Joubert v Venter* 1985 (1) SA 654 (A).

<sup>143</sup> *Craig v Voortrekkers Bpk* 1963 (1) SA 149 (A); *Benson v Robinson & Co (Pty) Ltd* 1967 (1) SA 420 (A).

<sup>144</sup> *Botha* supra note 45 para 79.

<sup>145</sup> *Basner v Trigger* 1946 AD 83 at 95.

<sup>146</sup> E Descheemaeker 'Protecting reputation: Defamation and negligence' (2009) 29 *Oxford Journal of Legal Studies* 603 at 626.

list of such situations is not closed, so it is possible to argue that there are other situations aside from those already recognised that ought to be protected.<sup>147</sup> The situation in which a defamatory joke has either been told during judicial or quasi-judicial proceedings, or has otherwise been reported in reports on proceedings of courts, Parliament and public bodies, is straightforward. The more complex issue is whether there can ever be a recognisable duty on the defendant to tell, an exercisable right for the defendant to tell, or a legitimate interest furthered by the defendant's telling of, a defamatory joke.<sup>148</sup>

Although most of the protected duties, rights and interests are legal in nature, they need not be. Those recognised may also be either moral or social ones.<sup>149</sup> Ultimately, 'the test of whether such a duty or right exists in a particular case is objective: did the circumstances in the eyes of a reasonable man create a duty or right which entitled the defendant to speak?'<sup>150</sup> In addition to the entitlement to speak, the person receiving the defendant's communication must have a reciprocal duty to receive, or a legitimate interest in receiving, the communication.<sup>151</sup> Very often it is the nature of the relationship between the parties, namely the defendant and the third parties to whom the statement was published, that will determine whether such a duty, right or interest exists. Some examples that have been recognised in the case law include the relationship between close relatives,<sup>152</sup> an employer and their employee,<sup>153</sup> a church council and its members,<sup>154</sup> as well as a parent and their child's teacher.<sup>155</sup>

Considering that the list is not closed, one could plausibly argue that there are indeed other occasions that ought to be protected on account of the existence of a social, and not necessarily a legal or moral, duty to speak where the person receiving the communication has a reciprocal and legitimate interest in being spoken to. The parameters of the defence will depend on the dictates of public policy, rendering the application of the defence highly context-sensitive.<sup>156</sup> The fact that the list is open-ended, however, in the sense that it is non-exhaustive and can be added to, does not entail that there are no constraints on adding to it. The requirement of establishing a legal, moral or social duty is potentially quite burdensome.

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<sup>147</sup> *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590C–E.

<sup>148</sup> *Watt v Longsdon* [1930] 1 KB 130 at 144: 'As to legal duty, the Judge should have no difficulty; the Judge should know the law; but as to moral or social duties of imperfect obligation, the task is far more troublesome.'

<sup>149</sup> *De Waal* supra note 141 at 121.

<sup>150</sup> *Botha* supra note 45 para 52.

<sup>151</sup> *Ehmke v Grunewald* 1921 AD 575 at 581.

<sup>152</sup> *Tromp v McDonald* 1920 AD 1.

<sup>153</sup> *Byrne v Masters Squash Promotions CC* 2010 (1) SA 124 (GSJ).

<sup>154</sup> *De Waal* supra note 141.

<sup>155</sup> *Jordaan v Van Biljon* 1962 (1) SA 286 (A).

<sup>156</sup> *Burchell* op cit note 5 at 245.

If a defamatory joke is told between parties whose relationship is protected and on an occasion that is recognised as being privileged, the defendant might avoid liability. So, were the member of a congregation to tell their priest a joke during a family dinner concerning that member's child's sexual molestation by a close family member, such a joke might arguably be protected.<sup>157</sup> Of course, it is difficult to imagine such a hypothetical joke being made given the seriousness of the subject matter, but it might nonetheless still be protected — granted both that it was relevant to the privileged occasion and that the defendant lacked actual malice.<sup>158</sup> Perhaps a more realistic example of a defamatory joke being told on a privileged occasion would be one shared between city council members at a meeting of the Town Council concerning the proper performance of the Mayor's functions.<sup>159</sup>

The greater limitation of the defence of qualified privilege for the protection of defamatory humour is its requirement of relevance. Not only must the occasion on which the defendant's statement was uttered be worthy of legal protection, but the actual content of the statement itself must be relevant to the recognised occasion.<sup>160</sup> Relevance is determined objectively, not subjectively.<sup>161</sup> It turns on a value judgment made by the presiding officer in a case, and 'due weight must be given to all matters which can properly be regarded as bearing upon it.'<sup>162</sup> The requirement of relevance poses a significant stumbling block to defamatory humour because defamatory jokes made on a privileged occasion must be 'reasonably connected with'<sup>163</sup> or 'reasonably appropriate to'<sup>164</sup> the purposes of that occasion. Therefore, funny one-liners and spur-of-the-moment defamatory quips concerning matters that are entirely unconnected to the privileged occasion are excluded from the ambit of the defence.<sup>165</sup>

Interestingly, the truthfulness of the defendant's assertion would have no bearing on its relevance to the privileged occasion, but proof that the defendant did not believe in the truth of what they were asserting *may* imply that they had acted with express malice, which would in turn defeat the defence.<sup>166</sup> The role of truth here is rather neat, for the publication of untrue statements will not preclude the privilege *if* the defendant in good faith believed their statement

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<sup>157</sup> Compare *O v O* 1995 (4) SA 482 (W).

<sup>158</sup> *Ibid* at 488F–H.

<sup>159</sup> *Hofmeyer v Stigant* (1879) 9 Buch 95.

<sup>160</sup> *May* supra note 49 at 18F–G.

<sup>161</sup> *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1204D–E.

<sup>162</sup> *Van der Berg* supra note 140 para 26.

<sup>163</sup> Neethling, Potgieter & Roos op cit note 9 at 221.

<sup>164</sup> Brand op cit note 24 para 127.

<sup>165</sup> *Lange v Atkinson* [2000] 3 NZLR 385 para 13.

<sup>166</sup> *Borgin* supra note 49 at 578H.

to be true, because such a person cannot then be said to have acted maliciously.<sup>167</sup> However, where the defendant either admits to knowing that their statement was false, or it can be shown that they were indifferent as to whether it was true or not, malice can be inferred and the defence will fail.<sup>168</sup>

This places the defendant in quite a strong position because the occasions of qualified privilege do not require the defendant to prove the truth of their statement. At the very least the defendant need only refrain from admitting to knowing of the falsity of their statement.<sup>169</sup> The defendant who either denies that they knew the statement to be false or says nothing at all can escape liability.<sup>170</sup> The same cannot be said for the defendant who seeks to rebut the presumption of *animus iniuriandi*, because a bald denial of intention to defame and silence are deemed insufficient to rebut that presumption.<sup>171</sup>

#### (iv) Reasonable publication

To satisfy this defence, the defendant's defamatory statement must be (1) false, (2) in the public interest and (3) published by the press (4) who acted reasonably in publishing the statement when and in the manner that they did.<sup>172</sup> The statement must be false to distinguish this defence from the defence of truth for the public benefit.<sup>173</sup> Similarly, either the subject matter of that which is published or the occasion on which it was published must be in the public interest.<sup>174</sup> Although the defence is typically understood as being limited to media defendants,<sup>175</sup> there are proponents for the defence to be extended to non-media defendants as well.<sup>176</sup> In determining the reasonableness of the publication, a host of factors may be considered including, but not limited to: the interest of the public in being informed; the nature, extent and tone of the defamatory allegations; the manner of the publication; the nature of the information on which

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<sup>167</sup> *Redelinghuys v Geidel* 1963 (4) SA 912 (W) at 917; *Carbonel v Robinson & Co (Pty) Ltd* 1965 (1) SA 134 (D) at 151.

<sup>168</sup> *Monckten v British South Africa Co* 1920 AD 324 at 332.

<sup>169</sup> *De Waal* supra note 141 at 121; *Basner* supra note 145 at 105; *Borgin* supra note 49 at 578H–579A.

<sup>170</sup> A Fagan 'Wrongfulness in the South African law of defamation' (2023) 140 *SALJ* 285 at 316–17.

<sup>171</sup> *Bogoshi* supra note 161 at 1202H.

<sup>172</sup> *Ibid* at 1212G–H.

<sup>173</sup> See Neethling, Potgieter & Roos op cit note 9 at 229 footnote 288 and the cases cited there.

<sup>174</sup> Van der Walt & Midgley op cit note 8 para 133 argue that this extension of the public interest requirement to include not only the public interest in the subject matter of the impugned material but also the public interest in the act of publication can be inferred from the ambiguous wording employed by Hefer JA in *Bogoshi* supra note 161 at 1212.

<sup>175</sup> Brand op cit note 24 para 133, as well as Neethling, Potgieter & Roos op cit note 9 at 229, refer to the defence as being one of *media* privilege.

<sup>176</sup> Van der Walt & Midgley op cit note 8 paras 132–3 and 138; FDJ Brand 'Privacy' in E Reid & D Visser (eds) *Private Law and Human Rights* (2013) 165–7; *Marais v Groenewald* 2001 (1) SA 634 (T).

the allegations were based; the reliability of their source; the steps taken to verify the truth of the information; and whether the plaintiff was given an opportunity to respond to the statement before its publication, where publication itself was not urgent.<sup>177</sup> Where the defendant succeeds in establishing these requirements on a balance of probabilities, their conduct is justified and deemed lawful. However, the plaintiff should likewise be able to defeat this defence by proof of malice or improper motive on the part of the defendant.<sup>178</sup>

If defamatory humour does not find refuge under any of the other existing defences rebutting the presumption of wrongfulness, then at the very least media defendants who publish defamatory jokes might be able to escape liability by invoking the protection of the reasonable publication defence. To return to *Pudney*, in addition to the editor of *For Him Magazine* in which the defamatory article appeared, the plaintiff also sued the media house responsible for the magazine's publication, Uppercase Media (Proprietary) Limited.<sup>179</sup> One wonders whether the latter might have succeeded had it raised the defence of reasonable publication. Although this defence is unavailable to the ordinary citizen, it may offer protection to the newspaper that publishes Zapiro's cartoons, namely the *Sunday Times*, or the production company that produces and distributes the digital recordings of Jimmy Carr's comedy shows, were Zapiro's cartoons and Carr's jokes ever found to be defamatory.

Perhaps the greatest limitation of the defence of reasonable publication is that it is only available to media defendants.<sup>180</sup> Therefore, whilst it might afford protection to secondary publishers such as the owner of the magazine in *Pudney*, it is unavailable to individual defendants such as the auctioneer in *Masch* and the schoolchildren in *Le Roux*. Although some have argued that the defence of reasonable publication ought to be extended to include not only the press but also ordinary citizens,<sup>181</sup> such a generalised public interest defence is largely indistinguishable from that which is already available to individual defendants in the form of a qualified privilege for those who report on the proceedings of courts, Parliament and other public bodies. The only difference would be that the individual defendant could now report on

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<sup>177</sup> *Bogoshi* supra note 161 at 1212H–13C; *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) para 68.

<sup>178</sup> Neethling, Potgieter & Roos op cit note 9 at 231. Although this was not expressly stated in *Bogoshi*, and notwithstanding that it has not been expressly stated in any case concerning the defence of reasonable publication thus far, it may be inferred from the fact that the press defendant's publication of a defamatory untruth cannot ever be deemed reasonable if the defendant knowingly made a false defamatory statement. See Fagan op cit note 170 at 314 and 319, who identifies that one of the prerequisites for reasonableness is supposedly that 'the defendants were unaware of the falsity of any averment in any of the articles' (*Bogoshi* supra note 161 at 1203F–G and 1221G–H).

<sup>179</sup> *Pudney* supra note 21 para 1.

<sup>180</sup> Brand op cit note 24 para 133; Neethling, Potgieter & Roos op cit note 9 at 229.

<sup>181</sup> Van der Walt & Midgley op cit note 8 para 133; *EFF v Manuel* 2021 (3) SA 425 (SCA) paras 58–68.

the individual plaintiff's political activity and exercise of public duties, for example, without necessarily confirming the truth thereof if the publication of the defamatory statement were reasonable and in the public interest.<sup>182</sup> But, as things stand, the reasonable publication defence is only available to press defendants.

(b) *A 'new' defence of jest*

Having canvassed the scope for the protection of defamatory humour under the existing defences aimed at rebutting the presumption of wrongfulness in subsection (a) above, this subsection draws on the limits of the existing defences to identify the exact instance of defamatory humour that will not be covered by any of them. The jokester who finds himself in such an unprotected position will be left without any defence rebutting the presumption of wrongfulness and, all other things being equal, will be held liable for defamation. The question then becomes whether the court is obliged to develop the common law in accordance with the Bill of Rights and create a new specialised defence of jest capable of rebutting the presumption of wrongfulness to protect such defamatory jokes.<sup>183</sup>

Notwithstanding that a recognised legal injury has been inflicted, '[i]n providing a justificatory defence the law nevertheless concedes that one may sometimes have sufficient reason to perform the wrongful act, all things considered.'<sup>184</sup> This means that 'there should exist a sufficient common or greater good, served or caused or achieved by the attack, to outweigh and thus "justify" the harm suffered.'<sup>185</sup> To determine whether a defence rebutting the presumption of wrongfulness exists, the balancing act between the pros and cons of the defendant's conduct 'is very much at the centre of attention'.<sup>186</sup> Ultimately the publication of a defamatory statement will only be deemed lawful if it is considered unreasonable to shackle the defendant with liability under the circumstances of the case.<sup>187</sup>

Reasonableness here refers not only to the *ex post facto* reasonableness of the defendant's conduct, but also to the reasonableness of imposing liability on the defendant for their conduct.<sup>188</sup> Although the standard of reasonableness is rather broad, it has come to be informed

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<sup>182</sup> Ibid.

<sup>183</sup> Constitution of the Republic of South Africa, 1996 s 8(3); *Khumalo* supra note 1 paras 30–1.

<sup>184</sup> Gardner op cit note 6 at 107.

<sup>185</sup> Descheemaeker op cit note 8 at 458.

<sup>186</sup> Gardner op cit note 6 at 109.

<sup>187</sup> *Le Roux* supra note 4 para 122.

<sup>188</sup> For an excellent explanation of the difference between these two separate enquiries into reasonableness, and their application to an interesting set of facts, see *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 (3) SA

by considerations of fairness, morality, public policy and the legal convictions of the community, all of which are informed and underpinned by the competing interests, norms and values embodied in the Constitution.<sup>189</sup> The unifying element amongst the defences that are listed as rebutting the presumption of wrongfulness is the legal enigma known as the public interest.

In *Modiri*, Brand AJ noted that '[n]o exact definition of the concept is readily available in textbooks or decided cases.'<sup>190</sup> So too Eric Descheemaeker opines that 'it is difficult to think of a legal construct which has a wider range of plausible understandings'<sup>191</sup> for it is 'a term so broad and vague that it could mean virtually anything.'<sup>192</sup> Despite the existence of several other dicta professing the elusiveness of the concept,<sup>193</sup> courts seem to be in agreement that the public interest threshold is not satisfied by the publication of material that is simply interesting *to* the public.<sup>194</sup> As such, the law will not countenance the public's interest in being made aware of salacious gossip and frivolous scandal.<sup>195</sup> Rather, the material published must concern matters that the public has a legitimate interest in being made aware *of*.<sup>196</sup> Such material, that the law deems worthy of protection, will no doubt change over time as the legal convictions of the community change.<sup>197</sup> It is, therefore, useful to delineate the precise public interest behind each of the existing defences because this will indicate whether there is perhaps a public interest in defamatory humour that is not otherwise already catered for.

For the defence of truth for the public benefit, the public interest is in receiving the truth on matters that are relevant to public, not private, concern.<sup>198</sup> For fair comment, the public interest is in the freedom to reason and to express one's real judgment and opinion on matters of public, not private, concern.<sup>199</sup> For the various instances of qualified privilege, the public interest is in having the honest flow of information between persons who are engaged in a special relationship that ought to be protected on specific occasions.<sup>200</sup> For reasonable

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394 (CC) paras 53–66. However, see Neethling, Potgieter & Roos op cit note 9 at 83–5 who question whether this understanding of wrongfulness that has developed in the Aquilian context can be transposed to the law of defamation wholesale. See further Fagan op cit note 170 at 294–5.

<sup>189</sup> *Bogoshi* supra note 161 at 1204D–E.

<sup>190</sup> *Modiri* supra note 2 para 20.

<sup>191</sup> Descheemaeker op cit note 8 at 475.

<sup>192</sup> E Descheemaeker 'Mapping defamation defences' (2015) 78 *The Modern Law Review* 641 at 660.

<sup>193</sup> *Tshabalala-Msimang v Makhanya* 2008 (6) SA 102 (W) para 37.

<sup>194</sup> *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 464C.

<sup>195</sup> However, see *Groenewald v Homsby* 1917 TPD 81 at 84–5.

<sup>196</sup> *Sage* supra note 194 at 465E.

<sup>197</sup> *Stanley v Central News Agency* 1909 TS 488 at 491; *Van Wyk v Steyn* 1924 OPD 68 at 71.

<sup>198</sup> *Graham* supra note 97 at 187.

<sup>199</sup> *Crawford* supra note 118 at 114.

<sup>200</sup> *Yazbek v Seymour* 2001 (3) SA 695 (E) at 702.

publication, the public interest is in having the free flow of information between a responsible press and members of the public.<sup>201</sup> Where defamatory humour is not covered by any of the existing defences, the looming question is whether there is a public interest in the publication of such statements that sufficiently outweighs the probable injury caused to the plaintiff's reputation, tips the balance of the scales in the defendant's favour and compels the law to recognise such publications as being lawful, ie not wrongful.

The ultimate class of defamatory jokes that are not be covered by any of the existing defences aimed at rebutting the presumption of wrongfulness are: (1) false (thereby precluding the defence of truth for the public benefit), (2) statements of fact (thereby precluding the defence of fair comment), (3) made by individual defendants (thereby precluding the defence of reasonable publication), (4) on occasions that have not already been recognised in existing cases as being privileged (thereby precluding the defence of qualified privilege). As such, the individual defendant who publishes a defamatory statement in the pursuit of raising a laugh, but who alleges false facts on an occasion that is not privileged, will not have any defence available to them rebutting the presumption of wrongfulness.

Naturally, one might argue that it is right that this is so.<sup>202</sup> Imagine that, at a suburban braai in Constantia, it was falsely said of the local Muslim shopkeeper that he was a terrorist. If the context in which this statement was uttered did not lead the reasonable observer to conclude that the statement was a joke, then it will be deemed defamatory by a court. It is difficult to see why the individual defendant who uttered this statement should escape liability in the instance where the statement is not covered by any of the existing defences, because there is no discernible public interest in making such a false defamatory statement. There are countless dicta which profess this. In *Couldridge v Eskom*,<sup>203</sup> Jansen J said that '[a] lie can never be applied for public benefit.'<sup>204</sup> Similarly, in *Bogoshi*, Hefer JA opined that '[u]ltimately there can be no justification for the publication of untruths'.<sup>205</sup> Again in *Khumalo*, O'Regan J declared that 'there is no powerful interest in falsehood.'<sup>206</sup> So too in *Modiri*, Brand JA stressed that '[p]ublication of defamatory matter which is untrue or only partly true can never be in the public interest, end of story.'<sup>207</sup>

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<sup>201</sup> *Bogoshi* supra note 161 at 1209H–1210H.

<sup>202</sup> Fagan op cit note 170 at 312–13.

<sup>203</sup> 1994 (1) SA 91 (SE).

<sup>204</sup> *Ibid* at 103.

<sup>205</sup> *Bogoshi* supra note 161 at 1212I–J.

<sup>206</sup> *Khumalo* supra note 1 para 36.

<sup>207</sup> *Modiri* supra note 2 para 22.

However, the breadth of these dicta must obviously be curtailed because the defences of qualified privilege and reasonable publication do in fact cater for the publication of false defamatory statements, albeit indirectly in the sense that the defendant need only refrain from admitting that they knew they were lying. In the case of qualified privilege, the defendant does not need to establish the truth of their statement and it is sufficient for them, when pressed, to either deny knowing it to be false or to say nothing in that regard.<sup>208</sup> In the case of reasonable publication, the defendant must at the very least, when pressed, provide evidence of why their belief in the truth of the statement was reasonable.<sup>209</sup>

But these dicta do still suggest that the individual defendant will be hard-pressed to find a worthy public interest in the publication of defamatory falsehoods outside of those public interests that already undergird the existing defences. To allow for the creation of a new and specialised defence of jest which caters for such statements would arguably flip the entire law of defamation on its head, because it would mean that the defendant who deliberately misrepresents the plaintiff, such that their estimation would be lowered in the eyes of right-thinking members of society generally, would escape liability for defamation.<sup>210</sup> That is precisely the sort of harm that the law of defamation proclaims to guard plaintiffs against. It is difficult to imagine that there is a worthy competing public interest in, for example, the protection of defamatory humour unfettered by the constraints of reasonableness and truth, for such a defence truly would allow the defendant to ‘murder another’s reputation in jest’.<sup>211</sup>

That being said, there may be scope under the existing defences for the greater protection of defamatory humour. In particular, the defence of qualified privilege might provide the perfect avenue for the protection of defamatory jokes on those occasions where the relationship between the speaker and their audience is of such a nature that the social utility in protecting the defendant’s defamatory statement outweighs the plaintiff’s probable reputational injury. Think, for example, of a defamatory joke that is told at a comedy show. On such an occasion, the comedian arguably has a legitimate interest in making people laugh through the telling of jokes and the audience arguably has a reciprocal interest in being humoured by said jokes. Of course, comedians must take care not to raise a laugh solely at the expense of an individual’s reputation. However, common sense dictates that they cannot be reasonably expected to get it

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<sup>208</sup> *Borgin* supra note 49 at 578H–579A.

<sup>209</sup> *Bogoshi* supra note 161 at 1203F–G and 1221G–H.

<sup>210</sup> *Fagan* op cit note 170 at 312–13.

<sup>211</sup> *Donoghue v Hayes* (1831) Hayes Ir Exch Rep 265 at 266.

right each and every time, so arguably they should be let off the hook when, on the odd occasion, they do not.

In 1996, comedian Chris Rock made a running joke in his comedy special, *Bring the Pain*. For eight minutes, Rock distinguished between two types of African Americans: the good ones, namely Black people, and the bad ones, whom he labelled the N-word. Throughout his sketch, Rock repeatedly took aim at the latter, joking that they ruined everything for the former. He suggested that these ‘bad Blacks’ steal from their neighbours, do not read the news and are over-reliant on state welfare. Such was his mock disdain for ‘bad Blacks’ that Rock even joked that he would consider joining the Ku Klux Klan just to kill a few of them.<sup>212</sup>

Now imagine, for a moment, that at the end of his skit Rock had turned to an audience member and berated him for his choice of clothing and accent. Imagine further that Rock had also implied that the audience member’s girlfriend was cheating on him because he was unemployed. Imagine further yet that Rock had called this audience member the N-word. Now imagine that this audience member sued Rock for defamation. Naturally, one might expect that Rock would escape liability because the court would find that the reasonable observer would not have taken Rock’s statements to be seriously asserting anything defamatory about the plaintiff, given the context in which they were uttered. However, assume that the court, in accordance with the precedent set by the majority in *Le Roux*, deemed Rock’s statements to be defamatory because they exposed the plaintiff to ridicule.<sup>213</sup> Ought Chris Rock to be vested with liability in such an instance?

Arguably he should not, because the nature of the relationship that exists between a comedian and their audience on the occasion of a comedy show is of such a nature that the reasonable person would deem there to be a legitimate interest on the comedian’s part to speak and a reciprocal legitimate interest on the audience’s part in being spoken to that deserves legal protection. Although Rock’s statements about the audience member would deserve to attract liability if they were uttered in the ordinary light of day, perhaps a form of qualified privilege ought to be available to comedian defendants who strike the plaintiff’s reputation in joke.<sup>214</sup>

In addition to comedy shows, other occasions might warrant similar protection.<sup>215</sup> These include the jokes told by the hosts of awards shows such as the South African Music Awards,

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<sup>212</sup> C Rock ‘Black people vs. Niggaz’ *YouTube* 1 June 1996, available at <https://www.youtube.com/watch?v=f3PJFOYE-x4>, accessed on 13 February 2023.

<sup>213</sup> See Chapter 4IV above.

<sup>214</sup> J Voet *The Selective Voet: Being the Commentary on the Pandects* translated by P Gane (1955) at 243.

<sup>215</sup> See the American case of *Polygram Records, Inc v Superior Court* 170 Cal App 3d 543 (1985) concerning a joke told by the late Robin Williams during a comedy performance at a nightclub.

which would assist the likes of Somizi,<sup>216</sup> the Golden Globes, which would assist the likes of Ricky Gervais,<sup>217</sup> and the Academy Awards, which would assist the likes of Chris Rock (although not even the defence of qualified privilege in the law of defamation could protect Rock from the palm of Will Smith's hand).<sup>218</sup> In addition to awards shows, perhaps protection ought to be extended to late-night TV shows known for their humour, thereby protecting the likes of hosts Bill Maher, James Cordon, Jimmy Kimmel, Jimmy Fallon, John Oliver, Seth Meyers, Stephen Colbert, Trevor Noah and the entire cast of *Saturday Night Live*.<sup>219</sup>

Yet more privileged occasions could include a Comedy Central Roast or a rap battle. Both occasions cater precisely for the unabashed trading of insults, the content of which may be either true or false, between willing participants. Such occasions call for the defendant's protection even in circumstances where the reasonable observer does not get the joke.<sup>220</sup> It is, of course, less clear whether a similar social duty to tell jokes and a reciprocal interest in being humoured can be said to exist between rival auctioneers at a public auction, as in the case of *Masch*, or between schoolchildren and their teachers at a public high school, as in the case of *Le Roux*.<sup>221</sup>

Some may take exception to this proposition. In recognising new privileged occasions, the application of the reasonableness requirement evokes powerful differences in opinion.<sup>222</sup> However, it bears remembering that even if the occasion of a comedy show is recognised as one that deserves to be privileged, such privilege is nonetheless qualified. To satisfy the defence, the defendant must also have acted within the scope of their privilege in the sense that their defamatory joke was relevant or germane to the occasion on which it was uttered.<sup>223</sup> As such, comedians would not have free reign to make defamatory jokes *en masse*.

The subject matter of the joke and the identity of the plaintiff would have some bearing on whether the comedian's joke was relevant to the privileged occasion. For example, Rock's

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<sup>216</sup> IOL op cit note 115.

<sup>217</sup> K Schaffstall 'Ricky Gervais explains how he negotiated Judi Dench Golden Globes joke' *The Hollywood Reporter* 5 May 2020, available at <https://www.hollywoodreporter.com/news/general-news/ricky-gervais-explains-how-he-negotiated-judi-dench-golden-globes-joke-1293349/>, accessed on 15 February 2023.

<sup>218</sup> LR France & S Elam 'Will Smith hit Chris Rock on Oscars telecast' *CNN* 3 April 2022, available at <https://edition.cnn.com/2022/03/27/entertainment/will-smith-chris-rock/index.html>, accessed on 13 February 2023.

<sup>219</sup> See the American case of *Frank v National Broadcasting Co, Inc* 119 NY App 2d 252 (1986) concerning a defamation suit launched against the broadcaster of *Saturday Night Live*.

<sup>220</sup> Although, a roast and rap battle might be covered less controversially by the defence of consent.

<sup>221</sup> In this regard, see the strong criticisms levelled by Brand AJ in *Le Roux* supra note 4 paras 120 and 126–8 against the argument made by the Freedom of Expression Institute (admitted as *amicus curiae*) that children ought to have free-reign to develop their satirical skills in accordance with their right to freedom of expression.

<sup>222</sup> *O v O* supra note 157 at 477I–J.

<sup>223</sup> *May* supra note 49 at 18F–G.

statements concerning the audience member would probably be accepted as being relevant and germane to his stand-up comedy routine. His faux attack on the audience member was not random. It was logically connected to his skit. Only if he had berated the audience member for some other conduct or characteristic that was wholly unrelated to the theme of his gag could it perhaps then be said that he had exceeded the bounds of the privilege.

#### IV CONCLUSION

This chapter evaluated the viability of jest as a defence rebutting either the presumption of intention or the presumption of wrongfulness. Section II argued that jest is ill-suited as a defence rebutting the presumption of intention due to the subtle but important distinction between motive to raise a laugh and legal intention to injure, the evidential difficulty implicit in disproving the presumption of intention, and the unavoidable overlap between the risky enterprise of joke-telling and the wide-reaching nature of the standard of intention that is *dolus eventualis*. These three interrelated reasons render it highly improbable that the defendant will ever succeed in rebutting this presumption by raising the defence of jest — a conclusion which is borne out by the fact that the defendant's plea of jest has failed in all three of the reported South African cases in which it has been raised thus far.

Considering these poor prospects of success, section III evaluated whether jest might better serve as a defence rebutting the presumption of wrongfulness. It assessed the extent to which defamatory humour is already protected by the traditional defences aimed at rebutting the presumption of wrongfulness, namely truth for the public benefit, fair comment, privileged occasion and reasonable publication. Thereafter, it delineated the precise limits of the existing defences and identified the exact instance of defamatory humour that is not covered by any of the defences. It concluded that it is doubtful whether there is a sufficient public interest in the publication of such false defamatory statements published by individual defendants on occasions that are not privileged which would warrant the creation of a new defence of jest aimed at rebutting the presumption of wrongfulness. However, it argued that there is scope under the defence of qualified privilege for the greater protection of defamatory humour on certain comedic occasions.

## I THE END OF THE ROAD

Humorous expression is valued in a multicultural society such as South Africa, and the right of jokesters to express themselves is constitutionally protected. But humour cannot be created at the expense of an individual's reputation, so the law of defamation must strike a delicate balance between these two competing interests. This dissertation attempted to shed light on humour in the law of defamation. In particular, it addressed whether the fact that the defendant's statement was humorous should affect whether liability for defamation is imposed for it. This necessarily implicated two sub-questions: whether the fact that the audience appreciated the defendant's publication as humorous should negate its defamatoriness and whether the defendant's intention to be humorous should insulate them from liability by grounding a defence.

Chapter 2 provided a high-level overview of the South African law of defamation to contextualise the reader before the remaining chapters investigated how humour fares under certain elements of the action.

Chapter 3 traced the historical treatment of humour in the law of defamation. It concluded that jest, which may refer either to the audience's reception of the defendant's publication as humorous or to the defendant's humorous intention, falls to be considered both as a contextual factor capable of influencing the enquiry into the defamatoriness of the defendant's statement and as a defence capable of rebutting either the presumption of the defendant's intention to injure (*animus iniuriandi*) or the presumption of wrongfulness.

Chapter 4 evaluated the fate of humour under the defamatoriness enquiry, using the superiority, release and incongruity theories of humour to analyse the Constitutional Court's divergent interpretations of the humour behind the impugned publication in the seminal defamation case involving humour: *Le Roux v Dey*.<sup>1</sup> It criticised the majority's finding of defamatoriness in that case on the ground that it erroneously employed a flawed test for defamatoriness based on the plaintiff's exposure to ridicule, which unduly curtails superiority humour. The lasting result is that the defendant will be held liable for superiority humour even in those instances where the plaintiff has not been defamed.

Chapter 5 evaluated the viability of jest as a defence to an action for defamation. It argued that jest is ineffectual as a defence aimed at rebutting the presumption of the defendant's

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<sup>1</sup> 2011 (3) SA 274 (CC).

intention due principally to the evidential difficulty implicit in rebutting the presumption and the unavoidable overlap between the risky enterprise of joke-telling and the wide-reaching nature of the standard of intention that is *dolus eventualis*. This led it to consider whether there is scope for the protection of defamatory humour under the existing defences aimed at rebutting the presumption of the defendant's wrongfulness instead. It argued that there is room for the increased protection of defamatory humour under the defence of qualified privilege in particular, which may be developed to recognise certain comedic occasions as being privileged.

## II THE SOLUTION

In light of these findings, it is clear that more work can still be done to protect humour in the law of defamation. For example, when determining whether the defendant's statement was defamatory of the plaintiff, judges should be more sensitive to the elements of incongruity humour present in the impugned statement and more attuned to the context in which it was published. The plaintiff's mere exposure to ridicule by way of being the butt of a superiority joke should not, without more, render the defendant liable for defamation. Otherwise courts run the risk of unduly curtailing superiority humour in instances where the plaintiff's defamation has not occurred. That the plaintiff's feelings were hurt by the defendant's humorous statement should be remedied, rather, through the action for insult and not by using the law of defamation.

However, even where the defendant's humorous statement is correctly deemed defamatory, there is scope under the existing defences aimed at rebutting the presumption of wrongfulness for the protection of defamatory humour. There is arguably room for the increased protection of defamatory humour under the defence of qualified privilege. Certain comedic occasions, where the relationship between the defendant and the audience to whom the defamatory statement was published is of such a nature that there is a social duty on the defendant to make the audience laugh and a social interest on the part of the audience in being humoured, could be recognised as being privileged. This would afford greater protection to those comedians, awards-show hosts and late-night television show presenters whose genuine attempts at humour do not land. Such statements deserve to be insulated from liability.

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